Supreme Court, U.S.
FILED
DEC 27 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-922

CHRYSLER CORPORATION, *Petitioner,*

v.

HAROLD BROWN, ET AL., *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNTIED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BURT A. BRAVERMAN
DANIEL STARK
COLE, ZYLSTRA & RAYWID
2011 Eye Street, N.W.
Washington, D.C. 20006

A. WILLIAM ROLF
P.O. Box 1919
Detroit, Michigan 48288

Attorneys for Petitioner Chrysler Corporation

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Statutes and Regulations	2
Statement of the Case	3
Reasons for Granting the Petition	9
Conclusion	28
Appendix A	1a
Appendix B	43a
Appendix C	58a
Appendix D	60a
Appendix E	66a

CASES: Page

Avco Corp. v. *Aero Lodge 735*, 390 U.S. 557 (1968) ... 13
Bristol-Meyers Co. v. *FTC*, 424 F.2d 935 (D.C.Cir.), *cert. denied*, 400 U.S. 824 (1970) 9
Charles River Park "A", Inc. v. *HUD*, 519 F.2d 935 (D.C.Cir. 1975) 14, 17, 18, 20, 21, 23
Cort v. *Ash*, 422 U.S. 66 (1975) 23
Crown Central Petroleum Corp. v. *Kleppe*, 14 FEP Cases 49 (D.Md. 1976) 12
Dickerson v. *United States Steel Corp.*, 12 E.P.D. § 11095 (E.D.Pa. 1976) 11
Environmental Protection Agency v. *Mink*, 410 U.S. 73 (1973) 11
FAA Administrator v. *Robertson*, 422 U.S. 255 (1975) 10, 11
General Dynamics Corp. v. *Dunlop*, 427 F.Supp. 578 (E.D.Mo. 1976), *appeal pending*, No. 77-1192 (8th Cir.) 17, 21
Hughes Aircraft v. *Schlesinger*, 384 F.Supp. 292 (C.D. Cal. 1974), *appeal pending*, No. 75-1064 (9th Cir.) 13, 21
McCoy v. *Weinberger*, 386 F.Supp. 504 (W.D.Ky. 1974) 14
National Parks and Conservation Assn. v. *Kleppe*, 547 F.2d 673 (D.C.Cir. 1976) 18
National Parks and Conservation Association v. *Morton*, 498 F.2d 765 (D.C.Cir. 1975) 22
Neal-Cooper Grain Company v. *Kissinger*, 385 F.Supp. 769 (D.D.C. 1974) 14
Pennzoil Co. v. *FPC*, 534 F.2d 627 (5th Cir. 1976) 14
Sanday v. *Carnegie-Mellon University*, 12 FEP Cases 101 (W.D.Pa. 1975) 11
Sears, Roebuck and Co. v. *GSA*, 553 F.2d 1378 (D.C. Cir. 1977), cert. den. —— U.S. —— (1977) ....Passim
Sears Roebuck and Co. v. *NLRB*, 421 U.S. 132 (1975) 11
Sonderegger v. *Department of the Interior*, 424 F.Supp. 847 (D.Idaho 1976) 21
The Prudential Insurance Company of America v. *National Organization for Women*, No. 76-1052, *cert. denied*, —— U.S. ——, 53 L.Ed.2d 238 (1977)..11, 13, 20
Westinghouse Electric Corp. v. *Schlesinger*, 542 F.2d 1190 (4th Cir. 1976), *cert. denied sub nom. Brown* v. *Westinghouse Electric Corp.*, —— U.S. ——, 53 L.Ed.2d 239 (1977) .....Passim

STATUTES AND REGULATIONS: Page

Administrative Procedure Act, 5 U.S.C. 701 *et seq.* 8, 20, 21, 23
5 U.S.C. 706 .....8, 21
5 U.S.C. 706 (2)(A) 8

Freedom of Information Act:
5 U.S.C. 552 ..... 2, 5
5 U.S.C. 552(a)(4)(G) 12
5 U.S.C. 552(b)(1) 15
5 U.S.C. 552(b)(3) 7, 20, 21
5 U.S.C. 552(b)(4) .....Passim
5 U.S.C. 552(b)(5) 15
5 U.S.C. 552(b)(6) 15

5 U.S.C. 301 .....2, 8, 17, 18, 20

28 U.S.C. 1254(1) 2

28 U.S.C. 1331(a) 7

18 U.S.C. 1905 .....Passim

29 C.F.R. 70.21(a) 3

41 C.F.R. Part 60-1 3
§ 60-1.2 3
§ 60-1.6 3
§ 60-1.40 4

41 C.F.R. Part 60-2 3

41 C.F.R. Part 60-40 .....2, 5, 19
§ 60-40.2(a) 5
§ 60-40.2(b)(1) 5
§ 60-40.3 5
§ 60-40.4 5
§ 60-40.4(d) 6

41 C.F.R. Part 60-60 3

MISCELLANEOUS:

Executive Order 11246, 30 Fed. Reg. 12319, as amended by Executive Order 11375, 32 Fed. Reg. 14303 (3 C.F.R. 169) 3

H. Rep. No. 1497, 89th Cong., 2d Sess. 12 (1966) 9

Lardner, *Use, Abuse of Freedom of Information Act*, Washington Post, July 27, 1976 16

	Page
Office of Federal Contract Compliance Programs, Federal Contract Compliance Manual § 2-202	3
Rule 19(b) of the Rules of the Supreme Court	13
S.Rep. No. 813, 89th Cong., 1st Sess. 3 (1965)	9
104 Cong. Rec. 6550 (1958)	18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No.

CHRYSLER CORPORATION, *Petitioner,*

v.

HAROLD BROWN, ET AL., *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNTIED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Chrysler Corporation respectfully petitions this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra,* pp. 1a-42a) is not yet officially reported. The opinion of the district court (App. B, *infra,* pp. 43a-57a) is reported at 412 F.Supp. 171.

JURISDICTION

The judgment of the court of appeals (App. C, *infra,* pp. 58a-59a) was entered on September 26, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether Exemption 4 of the Freedom of Information Act, 5 U.S.C. § 552(b)(4), mandates that private, confidential information which falls within that exemption not be publicly disclosed.

2. Whether agency regulations promulgated pursuant to 5 U.S.C. § 301 constitute "authorization by law" within the meaning of 18 U.S.C. § 1905 for disclosure of private, confidential business information.

3. Whether a person who has supplied to a government agency private, confidential information which assertedly is exempt from disclosure under Exemption 4 of the Freedom of Information Act, 5 U.S.C. § 552(b)(4), or whose disclosure assertedly would violate 18 U.S.C. § 1905, is entitled to a trial *de novo* in a suit to prevent disclosure of that information by the Government.

STATUTES AND REGULATIONS

The relevant provisions of the Freedom of Information Act, 5 U.S.C. § 552, as amended, 18 U.S.C. § 1905, 5 U.S.C. § 301, and the pertinent regulations of the Office of Federal Contract Compliance Programs, 41 C.F.R. Part 60-40, are set forth as App. D, *infra,* pp. 62a-65a.

STATEMENT OF THE CASE [1]

1. As a government contractor, Chrysler Corporation ("Petitioner") is required to comply with Executive Orders 11246 and 11375 [2] ("Executive Orders") and with various implementing regulations [3] which have been promulgated thereunder by the Department of Labor's Office of Federal Contract Compliance Programs ("OFCCP"). These orders and regulations require Petitioner and other government contractors to, *inter alia,* prepare and submit to Respondents [4] a variety of reports and information, including written affirmative action programs ("AAP's") and equal employment opportunity reports ("EEO-1's"), for its entire corporate domestic operations and separately for each of its individual domestic facilities.

[1] The statement of facts, which are not in dispute, is based on the opinion of the court below and the joint appendix in the court of appeals.

[2] 30 Fed. Reg. 12319, 32 Fed. Reg. 14303 (1967), 3 C.F.R. 169-177 (1974).

[3] 41 C.F.R. Parts 60-1, 60-2 and 60-60.

[4] Respondents are Harold Brown, Secretary of Defense; Lt. Gen. W. W. Vaughan, Commander of the Defense Logistics Agency (formerly, Defense Supply Agency) of the Department of Defense ("DSA"); F. Ray Marshall, Secretary of Labor; and Weldon J. Rougeau, Director of OFCCP. The Secretary of Labor is responsible for administering the equal employment opportunity program established by the Executive Orders. Executive Order 11246, Sec. 201. The Secretary discharges his responsibilities through OFCCP and has designated the Defense Supply Agency as one of the several "compliance agencies" responsible for monitoring government contractors' compliance with the Executive Orders, investigating charges made against contractors, and imposing sanctions upon contractors who do not comply with the Executive Orders. See Executive Order 11246, Subpart C; 41 C.F.R. §§ 60-1.2, 60-1.6; OFCCP Compliance Manual, § 2-202.

Under the Executive Orders and OFCCP's regulations, Petitioner is required to include in each of the nearly one hundred AAP's which it prepares annually highly detailed information of both a statistical and narrative nature concerning its total, and minority and female, employment for each department and subdepartment which exists at the particular facility and, within each such department, for each job classification. Such information includes, *inter alia,* data on staffing patterns, pay-scales, actual and expected shifts in employment and related employment matters; goals, timetables and future projections for the employment of minorities and females; and critical self-analyses where Petitioner believes it has not met its obligations under the Orders and regulations. 41 C.F.R. §§ 60-1.40, 2.11 and 2.12. The AAP's specifically at issue below were, respectively, 175 and 257 pages in length.

The EEO-1 reports which Petitioner is also required to furnish to Respondents are prepared on the Government's Standard Form 100. The EEO-1's contain statistical information with respect to the total number, and the number of minority and female, persons employed by Petitioner in nine specified job categories.

To enforce the Executive Orders, Respondents conduct "compliance reviews" and "complaint investigations" to determine whether a contractor is in compliance with, or in violation of, the Orders and OFCCP's regulations. At the conclusion of these reviews and investigations, Respondents prepare either a "compliance review report" ("CRR") or "complaint

investigation report" ("CIR") which describes and discusses the documents and information submitted to Respondents by the contractor, analyzes the contractor in light of the Orders and regulations, and recommends corrective measures which the contractor should be required to implement. The reports may incorporate, in whole or in part, AAP's, EEO-1's or supporting documents.

The Secretary of Labor has promulgated regulations providing for public disclosure of information from records of OFCCP and its compliance agencies. 41 C.F.R. Part 60-40. (App. D. *infra,* pp. 62a-65a). The regulations provide generally that "[u]pon the request of any person * * * records shall be made available for inspection and copying, notwithstanding the applicability of the exemption from mandatory disclosure [under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552], if it is determined that the requested inspection and copying furthers the public interest and does not impede any of the functions of the OFCC[P] or the Compliance Agencies except in the case of records disclosure of which is prohibited by law." 41 C.F.R. § 60-40.2(a). In addition, the regulations specifically provide that, upon request, "* * * [EEO-1 reports] which [are] submitted by contractors to the OFCC[P] [or] a compliance agency * * * shall be disclosed" (41 C.F.R. § 60-40.4) and that affirmative action programs, subject to limited exceptions (41 C.F.R. § 60-40.3), "must be disclosed." 41 C.F.R. § 60-40.2(b)(1).

2. This action arose when DSA notified Petitioner that DSA had received requests under the FOIA [5] for

[5] The FOIA requires agencies to disclose upon request any docu-

disclosure of affirmative action programs, EEO-1 reports, CRR's and CIR's for two of Petitioner's facilities. To the extent posible within the brief ten-day period allowed by Respondents, Petitioner objected to the proposed disclosure of the documents asserting, *inter alia,* that the AAP's and EEO-1's were exempt from disclosure under exemptions to the Freedom of Information Act and under OFCCP's rules, and that disclosure would violate 18 U.S.C. § 1905.[6]

Thereafter, DSA notified Petitioner that Respondents had determined that the documents at issue were subject to disclosure virtually in their entirety; and that Petitioner would not be furnished with a copy of the CIR or CRR prior to disclosure. In addition, Respondents stated that, because they were required by the FOIA to make a substantive decision on release of these documents within ten working days of receipt of the request, they would not await the result of any administrative appeal by Petitioner of Respondents' disclosure decision under the provisions of 41 C.F.R. § 60-60.4(d).

Faced with the threatened release of the documents, Petitioner commenced this action seeking to enjoin Respondents from publicly disclosing the documents and further seeking a declaratory judgment that the public disclosure by Respondents of any other such

ment in their files unless the document falls within one of nine specifically exempted categories. See App. D, *infra,* p. 60a.

[6] Petitioner also requested that Respondents furnish Petitioner with copies of the CRR and CIR which Respondents proposed to release—which Petitioner had never seen—so that Petitioner might be able to determine what parts of the reports were confidential and to intelligently present its claim of confidentiality.

documents for any of Petitioner's facilities was contrary to, *inter alia,* Exemptions 3 and 4 of the Freedom of Information Act, 5 U.S.C. § 552(b)(3) and (4), and 18 U.S.C. § 1905. The district court conducted a trial *de novo* during which both Petitioner and Respondents presented the testimony of expert witnesses and others relating to the nature of information contained in the contested documents, the uses to which such information could be put by competitors of Petitioner, and the adverse consequences which would be caused by disclosure.

On April 20, 1976, the district court issued its opinion. Appendix B, *infra,* pp. 43a-57a. The district court held that it had subject matter jurisdiction under 28 U.S.C. § 1331(a); that portions of the documents consisted of confidential commercial information whose disclosure would cause substantial competitive injury to Petitioner;[7] that such information is exempt from mandatory disclosure under Exemption 4 of the FOIA, 5 U.S.C. § 552(b)(4); and that disclosure of that information would violate 18 U.S.C. § 1905 and 29 C.F.R. § 70.21(a). On this basis, the district court concluded that disclosure of those portions of the AAP's was contrary to law and should be

[7] The district court found that "the testimony clearly shows that the manning tables are confidential • • • [and that] the release of the manning tables could cause Plaintiff substantial competitive harm in several ways. First, the possession of such a document could aid another corporation in its practice of employee raiding, a practice not unknown in the automobile industry. • • • Second, the possession of a manning table would permit a competitor to determine the exact use of Plaintiff's labor force, and thus the technology being applied by Plaintiff • • • [which information] would be useful in comparative analysis and would alert competitors to areas worth their managerial time. • • • Third, the possession of manning tables . . . would allow Plaintiff's competitors to reduce their risk-taking." App. B, *infra,* p. 51a.

enjoined pursuant to 5 U.S.C. § 706(2)(A). The court concluded, however, that other portions of the documents were not immune from public disclosure, and rejected Petitioner's request for declaratory relief. A supplemental memorandum and final order were filed on June 17, 1976. App. E, *infra,* pp. 66a-67a.

On cross-appeals by the parties the court of appeals reversed. App. A, *infra,* pp. 1a-42a. The court held, *inter alia,* that a cause of action to enjoin disclosure of documents which assertedly will violate FOIA Exemption 4 and 18 U.S.C. § 1905 exists only under § 706 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, and that none can be implied under Exemption 4 or § 1905. The court also held that government agencies have discretion to disclose confidential, private documents notwithstanding the fact that the documents fall within an FOIA exemption, and that disclosure of information pursuant to agency regulations promulgated under 5 U.S.C. § 301 was "authorized by law" within the meaning of 18 U.S.C. § 1905. Finally, the court held that an action to enjoin disclosure of documents was not to be conducted on a *de novo* basis, as the district court had, but rather that review should be limited to only a determination, on the basis of the agency record, of whether the agency's decision to disclose was arbitrary, capricious or an abuse of discretion. Finding that the agency record was inadequate, the court remanded the case with instructions that further proceedings be conducted before the agency.

REASONS FOR GRANTING THE PETITION

Businesses such as Petitioner are asked or compelled to submit vast amounts of confidential, proprietary in-

formation to federal government agencies on a continuing basis. In the hands of the Government, this information enables federal agencies to effectively monitor the economy and to determine industry's compliance with diverse regulatory programs. Indiscriminately released, the same information can reveal intimate aspects of a company's operations and can result in severe competitive or other injury to the business. Consequently, many, if not most, businesses take careful precautions designed to guard against the release of such information and, apart from submission to the Government for limited regulatory purposes, generally do not publicly disclose much of the information which they furnish to federal agencies.

Traditionally, the confidentiality of such private business information has been respected by the Government. However, under recent interpretations of the Freedom of Information Act, the tables of business privacy have turned to the point where, today, businesses which submit confidential information to government agencies have no assurance that the confidentiality of that information will be respected. This result neither was intended nor is appropriate under the Act.

Although the FOIA was intended to open the processes of government to public scrutiny,[5] Congress sought to balance the Act's disclosure philosophy with the "equally important rights of privacy with respect to certain information in government files."[6] While

---

[5] S.Rep.No. 813, 89th Cong., 1st Sess. 3 (1965) ("S.Rep.No. 813"); H.Rep.No. 1497, 89th Cong., 2d Sess., 12 (1966). *See* Bristol-Myers Co. v. FTC, 424 F.2d 935, 938 (D.C.Cir.), *cert. denied,* 400 U.S. 824 (1970).

[6] S.Rep.No. 813, at 3.

each of the exemptions to the Act reflects this concern over rights of privacy to a varying degree, it was of particular significance to Congress in fashioning Exemption 4. Similarly, in enacting Exemption 3, Congress was specifically concerned with preserving the protection which previously had been afforded to confidential information through preexisting nondisclosure statutes.[10] Unfortunately, since 1965, courts have experienced increasing difficulty in accommodating these competing interests and aims of the Act.

The instant case is representative of a rapidly growing number of "reverse FOIA" actions which have been brought by private parties to enjoin federal government agencies from disclosing, pursuant to the Freedom of Information Act, confidential information which those parties have furnished to the Government. As the court below recognized,

> "[t]he case presents several important issues about agency management of [confidential] . . . information, about agency discretion to disclose information . . . and about the availability of remedies for the prevention of disclosure." App. A, *infra*, p. 21a.

These issues are of broad public significance since they affect the disclosability not only of employment information provided to the Government by tens of thousands of government contractors such as Petitioner, but also of an endless array of other commercial and financial materials of a confidential nature which businesses and individuals are asked or compelled to submit to the many hundreds of federal government agencies which are subject to the FOIA. Those materials,

---

[10] FAA Administrator v. Robertson, 422 U.S. 255, 263-5 (1975).

although long maintained in well deserved confidence by the Government, now are, under the construction of the FOIA urged by the Respondents and endorsed by the court below, threatened to be disclosed to anyone from the well intentioned member of the public to the unscrupulous competitor. Such disclosure portends serious adverse consequences not only to the persons who have furnished the information to the Government, but also to the Government itself whose ability to acquire information on a voluntary basis from the private sector for implementation of regulatory programs will be impaired if the confidentiality with which the information was initially submitted is not respected.[11]

While this Court has previously reviewed FOIA cases involving conflicts between administrative agencies and parties seeking disclosure of documents,[12] the Court has as of yet declined to address the equally important clash between those interests and the right of businesses and other persons to continued confidentiality of information which they submit to federal agencies. Although questions similar to those presented by this case were brought before this Court on at least three occasions during the last term, certiorari was denied in each instance.[13]

---

[11] *See*, Dickerson v. United States Steel Corp., 12 E.P.D. § 11095 (E.D.Pa. 1976); Sanday v. Carnegie-Mellon University, 12 FEP Cases 101 (W.D.Pa. 1975).

[12] See, *e.g.*, Environmental Protection Agency v. Mink, 410 U.S. 73 (1973); FAA Administrator v. Robertson, *supra;* Sears, Roebuck and Co. v. NLRB, 421 U.S. 132 (1975).

[13] Brown v. Westinghouse Electric Corp., No. 76-1192, *cert. denied*, —— U.S. ——, 53 L.Ed.2d 239 (1977); The Prudential Insurance Company of America v. National Organization for Women, No. 76-1052, *cert. denied*, —— U.S. ——, 53 L.Ed.2d 238 (1977);

The time for review of these issues by this Court is now at hand. The opinion of the court below is diametrically contrary to the decisions of either the Fourth or District of Columbia Circuit on each of the fundamental reverse FOIA issues presented by this petition.[14] Due to the uncertainty caused by these conflicting circuit court decisions,[15] persons who must decide whether to furnish confidential information to federal agencies have no means of knowing whether the confidentiality of such information will be preserved, or whether the information will be disclosed under the FOIA; agencies and their employees have no certain standards by which to make disclosure decisions;[16]

Sears, Roebuck and Co. v. GSA, No. 76-1642, *cert. denied*, —— U.S. ——, 54 L.Ed.2d 84 (1977).

[14] Thus, in contrast to those cases in which certiorari was denied (see n. 13, *supra*), there is no longer a need for further development of the law at the circuit court level.

[15] Disagreement exists not only among, but even *within*, the circuits on some of the issues presented by this petition. *Compare, e.g.*, Crown Central Petroleum Corp. v. Kleppe, 14 FEP Cases 49 (D.Md. 1976), *with* Westinghouse Electric Corp. v. Schlesinger, *supra*.

[16] Agency employees who must make disclosure decisions are faced, on the one hand, with the criminal sanctions of 18 U.S.C. § 1905 should they erroneously decide to disclose information and, on the other hand, with the contempt sanctions of 5 U.S.C. § 552(a)(4)(G) should they mistakenly refuse to disclose information in response to an FOIA request. Moreover, agency officials have been directed by some courts to perform what other courts hold to be criminal acts. While decision makers will always face some uncertainty as to the correctness of their decisions, the conflicting circuit court decisions, compounded by the liberal venue rules which govern the choice of the circuit within which such decisions will be reviewed, make for a chaotic environment in which reasoned decision making by government officials on disputed disclosure requests may be well nigh impossible.

and federal courts are left aimlessly adrift in deciding not only the substantive issues of reverse FOIA cases but, also, even in determining fundamental matters such as the proper scope of judicial inquiry in an action to enjoin disclosure. Absent guidance by this Court, which has been expressly requested by some courts[17] and which is obviously needed by others,[18] courts and federal agencies alike will be forced to continue to resolve sensitive disclosure questions on the basis of the diametrically contrary judicial precedent which now exists.

For these reasons, and those presented below, Petitioner submits that certiorari should be granted.[19]

1. Respondents asserted below that they had discretion to disclose Petitioner's documents notwithstanding the district court's finding that the documents fell within Exemption 4 of the FOIA[20] because they

---

[17] See, *e.g.*, Sears, Roebuck and Co. v. GSA, 553 F.2d 1378, 1385 (D.C.Cir. 1977), where the D.C. Circuit expressly noted the absence of, and need for, "decisive new guidance by the Supreme Court" on some of the very same questions which are presented by this petition.

[18] The uncertainty surrounding these issues is reflected by the action of the U.S. Court of Appeals for the Ninth Circuit in *Hughes Aircraft* v. *Schlesinger*, No. 75-1064, a case involving many of the same issues that are presented here. There, on April 14, 1977, one year after oral argument, the Ninth Circuit withdrew the case from submission pending action by this Court on the petitions filed in *Westinghouse* and *Prudential*. Despite this Court's denial of certiorari in those cases in May 1977, the *Hughes* case remains undecided.

[19] *See* Rule 19(b) of the Rules of the Supreme Court; and Avco Corp. v. Aero Lodge 735, 390 U.S. 557, 559 (1968).

[20] Exemption 4 provides that the disclosure mandate of the FOIA "does not apply to matters that are . . . commercial or financial

were confidential and would cause substantial competitive injury to Petitioner if disclosed.[21]

The court below adopted Respondents' position in deciding this case. Although it recognized that, in enacting the FOIA, Congress was concerned that "disclosure of certain information might injure interests in privacy and confidentiality which may be as important as the public's right to general access to agency information," the court nonetheless rejected the notion that "Congress in the FOIA intended . . . that the exemptions make nondisclosure mandatory . . ." and held that government agencies have broad discretion to disclose exempt information. App. A, *infra,* pp. 23a-25a. Two other circuit courts have reached a similar conclusion.[22]

As the court of appeals observed (App. A, *infra,* p. 23a), its holding is contrary to that of the Fourth Circuit in *Westinghouse Electric Corp. v. Schlesinger,* 542 F.2d 1190 (4th Cir. 1976), *cert. denied sub nom. Brown v. Westinghouse Electric Corp., supra.*[23] There, the Fourth Circuit observed that

> "[t]he protection from disclosure given such information by Exemption 4 was stated in the legislative hearings to have been granted to such in-

information obtained from a person and privileged or confidential . . ." 5 U.S.C. § 552(b)(4); see App. D. infra, p. 61a.

[21] See n. 7, *supra.* This finding was not challenged by Respondents on appeal.

[22] Charles River Park "A", Inc. v. HUD, 519 F.2d 935 (D.C.Cir. 1975); Pennzoil Co. v. FPC, 534 F.2d 627 (5th Cir. 1976).

[23] *See also* McCoy v. Weinberger, 386 F.Supp. 504 (W.D.Ky. 1974); Neal-Cooper Grain Company v. Kissinger, 385 F.Supp. 769 (D.D.C. 1974).

> formation 'not only as a matter of fairness, but as a matter of right . . .' * * * [T]he Act was intended, to use the language of the Senate report, to set 'up workable standards for what records should and should *not* be open to public inspection.' And one of the sections of the Act, which declared what private information acquired by the government 'should *not* be open to public disclosure' was Exemption 4. * * * This provision in the Act was more than a simple exemption; it represented an express affirmation of a legislative policy favoring confidentiality of private information furnished government agencies, the disclosure of which might be harmful to *private* interests. It was manifestly intended to protect that private interest." 542 F.2d at 1211 (footnotes omitted) (emphasis in original).

On this basis, the court concluded that Exemption 4 confers upon a supplier of private, confidential commercial information the *right* to prevent the disclosure of information which falls within Exemption 4.

There is a fundamental conflict between the decision of the court below (and those of the Fifth and D.C. Circuits), on the one hand, and that of the Fourth Circuit, on the other, which this Court should resolve. That conflict can be resolved by recognizing the inherent difference between those FOIA exemptions which obviously were intended to protect *agencies* from mandatory disclosure of agency information (e.g., Exemptions 1 and 5), and those exemptions which clearly were fashioned to protect *private,* nongovernmental interests (e.g., Exemptions 4 and 6). While the Government should and does have the power to waive the protection from mandatory disclosure of agency information afforded by the first

category of exemptions, the agency does not and should not have the power to waive the protection which Congress intended to bestow on private parties through the second. For, although Congress intended that disclosure of *agency* documents which fall within the FOIA exemptions would ordinarily be within the agency's discretion, it intended to accord greater protection to *private* confidential information which *private* individuals and businesses furnish to the Government, the disclosure of which would be harmful to *private* interests.[24]

Petitioner submits that only by recognizing the distinction drawn by Congress between *private* and *agency* records can the FOIA's basic disclosure policy *and* the equally important congressional policy underlying the exemptions *both* be given their intended effect. The Fourth Circuit, in contrast to the decisions of the court below [25] and the D.C. and Fifth Circuits,

[24] The FOIA "was *not* enacted for the purpose of enabling the public to obtain information about *individuals* and *corporations*, about what those individuals or corporations are doing, or about what their activities and policies are • • •;" rather, "[t]he purpose of the . . . Act was to protect the people's right to obtain information about their *government*, to know what their government is doing, and to obtain information about government activities and policies." Westinghouse Electric Corp. v. Schlesinger, 542 F.2d at 1210 n. 64 (emphasis added). Curiously, however, most of the documents whose threatened disclosure has given rise to reverse FOIA actions have concerned the actions, plans and policies of *private* parties, not those of the *government*, and have been sought either by corporations or their agents seeking information about their competitors or by parties in litigation who seek to bypass the Federal Rules of Civil Procedure. See Lardner, *Use, Abuse of Freedom of Information Act*, Washington Post, July 27, 1976, at A 4.

[25] In fact, the court below conceded "that disclosure of submitter information is qualitatively different from disclosure of data directly relating to government operations, and that the interest in privacy

correctly drew this distinction in holding that, regardless of the Government's discretion to disclose exempt *agency* documents, Exemption 4 mandates that *private* documents which fall within the exemption not be disclosed.

2. Section 1905 of Title 18 of the U.S. Code is a criminal statute which makes it unlawful for any government official or employee, "to any extent not authorized by law", to disclose information which concerns or relates "to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any . . . corporation . . ." [26] App. D, *infra*, p. 61a.

The court below held that 5 U.S.C. § 301 [27]

> "is a separate source of agency authority for the promulgation of disclosure regulations, and disclosures pursuant to such regulations are author-

appears stronger with respect to the former than the latter." App. A, *infra*, p. 22a. Yet, the court paid little heed to this qualitative difference in ruling that Respondents may disclose private information which falls within Exemption 4.

[26] Numerous federal courts have held that an agency may be enjoined from disclosing information in violation of 18 U.S.C. § 1905. See, *e.g.*, Westinghouse Electric Corp. v. Schlesinger, *supra*; General Dynamics Corp. v. Dunlop, 427 F.Supp. 578 (E.D.Mo. 1976), *appeal pending*, No. 77-1192 (8th Cir.); Charles River Park "A", Inc. v. HUD, *supra*.

[27] See App. D, *infra*, pp. 61a-62a. 5 U.S.C. § 301 provides in pertinent part:

> "The head of an executive department or military department may prescribe regulations for . . . the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public."

ized by law and immune from the prohibitions of § 1905. Since the OFCC[P] disclosure regulations are valid under § 301, all disclosures pursuant to those regulations are authorized by law and therefore not subject to § 1905." App. A, *infra,* 29a.

The holding of the court below is both incorrect and, as that court acknowledged (App. A, *infra,* p. 29a), in conflict with the decision of the D.C. Circuit in *Charles River Park "A", Inc. v. H.U.D., supra.*[28] There, the D.C. Circuit examined the very same legislative history of the 1958 amendment to § 301 [29] upon which the court below relied, yet concluded, contrary to the Third Circuit, that "Section 301 does not authorize regulations limiting the scope of section 1905." 519 F.2d at 942-3.

The divergent interpretations by these circuit courts of the same statute and underlying legislative history warrants this Court's review, particularly in light of the unsettling consequences which judicial uncertainty on this question must have within the Government. Section 1905 is a criminal provision which imposes penalties upon government employees who disclose certain types of documents "to any extent not authorized by law." Many government officials must routinely decide whether or not to disclose documents pursuant to agency disclosure regulations which have been promulgated pursuant to 5 U.S.C. § 301. Yet, as

[28] See also National Parks and Conservation Assn. v. Kleppe, 547 F.2d 673 (D.C.Cir. 1976); and Sears, Roebuck and Co. v. GSA, *supra.*

[29] The sponsor of the amendment expressly stated that it did "not affect the confidential status of information given to the government and carefully detailed in Title 18, United States Code, Section 1905." 104 Cong. Rec. 6550 (1958).

a result of the conflict among the circuits created by the decision of the court below, these government officials are now left without reliable guidance as to whether those regulations provide the authorization for disclosure necessary under 18 U.S.C. § 1905.[30]

Review of the decision below is also warranted in light of the fact that, under the position taken by the Third Circuit, agency officials such as Respondents who are potential defendants in a criminal action brought under § 1905 for the unlawful disclosure of documents are free to define or redefine the scope of illegal conduct under that statute merely by amending or promulgating agency regulations which authorize disclosure.[31] Thereby, these potential defendants can relieve themselves of criminal liability for acts which, absent the slender thread of their own agency regulations, would violate § 1905.[32] Such a result not only violates § 1905 but also contravenes public policy by allowing government officials who violate 18 U.S.C. § 1905 to exculpate themselves merely by promulgating broad agency disclosure regulations in justification of their conduct.[33]

[30] See n. 16, *supra.*

[31] Indeed, in the instant case the disclosure regulations (41 C.F.R. Part 60-40) which were found by the court below to render § 1905 inoperative were promulgated by Respondents *without* prior notice or opportunity for public comment.

[32] This possibility was foreseen by the Fourth Circuit in *Westinghouse Electric Corp.* v. *Schlesinger:* "It would be an incredible rule that a legislative prohibition such as § 1905, fixing limits on executive action . . . , is to be construed and applied by the executive . . . This would be tantamount to committing the execution of such law to 'the self-restraint of the executive branch' itself and making the executive's *ipse dixit* final." 542 F.2d at 1215 (citations omitted).

[33] Should this Court decide that agency disclosure regulations

3. Finally, this Court should declare whether in an action to enjoin disclosure of documents which assertedly will contravene FOIA Exemption 4 and 18 U.S.C. § 1905, the plaintiff is entitled to a trial *de novo* or, as the court below held, to only a more limited form of judicial review under the Administrative Procedure Act. The court below, finding that a cause of action could not be implied under 18 U.S.C. § 1905 or Exemption 4, held that a submitter's cause of action in a re-

promulgated under 5 U.S.C. § 301 do not constitute "authorization by law" within the meaning of 18 U.S.C. § 1905, Petitioner submits that the Court should also consider the related question of whether 18 U.S.C. § 1905 is a specific statutory exemption from disclosure within the meaning of Exemption 3 of the FOIA, 5 U.S.C. § 552(b)(3), and therefore whether documents whose disclosure would violate § 1905 are also exempt from mandatory disclosure under the FOIA. At present, the circuit courts are divided on this question. *Compare* Westinghouse Electric Corp. v. Schlesinger, *supra* (holding that § 1905 is an Exemption 3 statute) with Charles River Park "A", Inc. v. HUD, *supra* (holding that § 1905 is not an Exemption 3 statute). Indeed, the D.C. Circuit, in one of its most recent decisions on the issue, referred to this as the "threshold question" in reverse FOIA cases involving confidential, commercial information and expressly asked this Court for guidance on the issue. Sears, Roebuck and Co. v. GSA, 553 F.2d at 1385.

This question has been presented to the Court at least three times within the past year. See Brief of Respondent United States Steel Corporation in Support of the Petition, pp. 4-8, in Brown v. Westinghouse Electric Corp., *supra;* Petition for Writ of Certiorari, at pp. 20-27, in The Prudential Insurance Company v. National Organization for Women, *supra;* Petition for Writ of Certiorari, pp. 8-9, in Sears, Roebuck and Co. v. GSA, *supra.* However, none of those cases presented the preliminary question—whether agency regulations constitute "authorization by law"—in the context of a split among the circuits, thus possibly explaining this Court's reluctance to decide the Exemption 3 issue. In contrast, as a result of the decision of the court below, both issues are now the subject of sharp disagreement among the circuits, making this case an appropriate vehicle for resolution of this troublesome matter.

verse FOIA case arose only under the APA."[34] Reciting that "[j]udicial review under the APA ordinarily is limited to a 'review of the whole (agency) record or parts of it cited by a party' [5 U.S.C. § 706 (1970)]" (App. A, *infra,* pp. 36a-37a), the court held that, absent *inter alia* a finding that the agency's factfinding procedures are inadequate, the scope of judicial review in reverse FOIA actions was to be limited to a determination of whether the disclosure decision was arbitrary, capricious or an abuse of discretion. App. A, *infra,* pp. 36a-39a; see 5 U.S.C. § 706.

The holding of the court below is contrary to the holdings of numerous other federal circuit and district courts[35] which have held that a plaintiff in a reverse FOIA action is entitled to *de novo* review of its claims under 18 U.S.C. § 1905 and FOIA Exemption 4. Thus, in *Charles River Park,* the D.C. Circuit observed:

> "A plaintiff in a suit such as this is obviously entitled to no relief if the government could be forced to disclose the information it wishes to reveal in a suit under the FOIA. Thus, the district court should hold a hearing to determine whether the information involved here would have been exempt just as it would if a suit had been brought under the FOIA to compel disclosure. *See* 5 U.S.C. § 552(b)

[34] The court held that Congress did not intend "that the [FOIA] exemptions . . . provide the predicate for an implied cause of action" and "reject[ed] the proposition that § 1905 would serve as a predicate for a private civil cause of action." App. A, *infra,* pp. 23a, 30a.

[35] *See, e.g.,* Charles River Park "A", Inc. v. HUD, *supra;* Sears, Roebuck and Co. v. GSA, *supra;* Westinghouse Electric Corp. v. Schlesinger, *supra;* General Dynamics Corp. v. Dunlop, *supra;* Sonderegger v. Department of the Interior, 424 F.Supp. 847 (D. Idaho 1976); Hughes Aircraft v. Schlesinger, 384 F.Supp. 292 (C.D.Cal. 1974), *appeal pending,* No. 75-1064 (9th Cir.).

(3); National Parks and Conservation Association v. Morton [498 F.2d 765 (D.C.Cir. 1975)]. *In holding this hearing the district court is not reviewing agency action; it is making a threshold determination whether the plaintiff has any cause of action at all.*" 519 F.2d at 940 n.4. (Emphasis added).

Similarly, in *Westinghouse Electric Corp.* v. *Schlesinger,* the Fourth Circuit expressed the same view:

> "Should not the person who was threatened with harm through a disclosure, which Congress had indicated clearly is against the public policy as expressed in the FOIA itself be the proper one to assert that right to protection from disclosure assured him under Exemption four, in an equity action in which he can have a *de novo* trial? The envious competitor or the curious busybody demanding access to that private information has the right to such a *de novo* trial. The Act gives it to him. But is not the same right to be implied, when the supplier, with a right that Congress gave him 'not only as a matter of fairness but as a matter of right,' seeks what may be regarded as correlative relief?" 542 F.2d at 1213.

While some of the courts which have reached this conclusion have no doubt been influenced by, *inter alia,* their view that an implied cause of action exists under Exemption 4 and 18 U.S.C. § 1905 to enjoin disclosure of confidential information in contravention of those statutes,[36] the conclusion that the reverse FOIA plain-

[36] See, *e.g.,* Westinghouse Electric Corp. v. Schlesinger, where the Fourth Circuit held both that "[t]he FOIA itself . . . confers on a supplier of *private* information, an implied right to invoke the equity jurisdiction to enjoin the disclosure of information within Exemption 4" and that a cause of action may be implied to enjoin "the threat of action by a public officer '. . . contrary to a specific [federal statutory] prohibition' such as § 1905 . . ." 542 F.2d at

tiff is entitled to a *de novo* trial pertains even if review is predicated solely upon the APA. Thus, even within the District of Columbia Circuit, where the submitter's cause of action in reverse FOIA cases has been found to arise under the APA, the circuit court has directed the district courts to conduct a *de novo* judicial determination of whether the information is subject to mandatory disclosure, or exempt from disclosure, under the FOIA. *See Sears, Roebuck and Co.* v. *GSA,* 553 F.2d at 1381; *Charles River Park "A", Inc.* v. *HUD,* 519 F.2d at 940 n. 4; *Westinghouse Electric Corp.* v. *Schlesinger,* 542 F.2d at 1207.

This case presents an excellent opportunity for the Court to resolve the conflict on this important federal question. Because the issue is one which pervades all reverse FOIA actions and which has great practical significance [37] to persons who are aggrieved by improper

1209, 1210.

The decisions of the Third and Fourth Circuits are clearly in conflict on this point. See n. 34, *supra.* Although the resolution of this question will not significantly affect the access of submitters to the courts (since all courts have recognized the existence of some kind of cause of action), the issue does have substantial bearing on the scope of proceedings to be conducted in the district courts, i.e., whether there is to be a *de novo* trial. Consequently, should the Court be of the view that a *de novo* trial would not be appropriate in an action which is predicated on the APA, Petitioner submits that the Court should then consider whether a cause of action can, as the Fourth Circuit correctly held, be implied under 18 U.S.C. § 1905 or Exemption 4 and, if so, whether a *de novo* trial would be appropriate in such an action. The exercise of certiorari jurisdiction on this question would be appropriate since the circuit courts have applied the decisions of this Court (*e.g.,* Cort v. Ash, 422 U.S. 66 (1975)) in a conflicting and irreconcilable manner.

[37] Numerous aspects of the agency disclosure process and the FOIA itself demonstrate why a *de novo* judicial determination of whether the disclosure of information would violate § 1905 or

government disclosure of private, confidential information, the Court should not let this opportunity pass by.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

BURT A. BRAVERMAN
DANIEL STARK
COLE, ZYLSTRA & RAYWID
2011 Eye Street, N.W.
Washington, D.C. 20006

A. WILLIAM ROLF
P.O. Box 1919
Detroit, Michigan 48288

Attorneys for Petitioner
Chrysler Corporation

Exemption 4 is essential to protect the interests of persons who furnish confidential information to the Government. ***First***, neither the FOIA nor most agency regulations require that notice be provided to persons whose documents are to be disclosed. ***Second***, even where notice is provided gratuitously, disclosure decisions (which often involve complex economic and technical questions) are made within the ten day time limit imposed by the FOIA, a period which generally is far too brief to permit the submitter of the documents to object with specificity or the lay agency official to engage in a thorough examination of the documents, and which renders it likely if not certain that an adequate agency record will *not* be developed. ***Third***, as demonstrated by this case, the FOIA does not require an agency to make findings in support of its decision to disclose and, in fact, virtually no agencies do so, thereby making meaningful judicial review on the basis of the "agency record" impossible. ***Finally***, as also reflected by this case, the essential right to an administrative appeal from an adverse initial disclosure decision is often illusory because agencies, under compulsion of the FOIA time limits, must disclose the documents prior to completion of the appeal. Consequently, a person threatened with disclosure of confidential documents must be afforded the same *de novo* judicial determination of the disclosability of the information which the FOIA *guarantees* to persons seeking to compel disclosure.

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 76-1970 and 76-2238

CHRYSLER CORPORATION

v.

JAMES A. SCHLESINGER, Secretary United States Department of Defense; LT. GEN. WALLACE ROBINSON, Director, Defense Supply Agency; PHILIP J. DAVIS, Director, Office of Federal Contract Compliance, and JOHN DUNLOP, Secretary United States Department of Labor

CHRYSLER CORPORATION, Appellant in No. 76-1970

JAMES A. SCHLESINGER, Secretary United States Department of Defense; LT. GEN. WALLACE ROBINSON, Director, Defense Supply Agency; PHILIP J. DAVIS, Director, Office of Federal Contract Compliance; and JOHN DUNLOP, Secretary United States Department of Labor, Appellants in No. 76-2238

(D.C. Civil Action No. 75-159)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

Argued June 13, 1977

Before VAN DUSEN, ADAMS and GIBBONS, *Circuit Judges*

Opinion of the Court

(Filed September 26, 1977)

[As amended by order dated October 18, 1977]

GIBBONS, *Circuit Judge*

Plaintiff, Chrysler Corporation (Chrysler), appeals and defendants, federal government officials,[1] cross-appeal, from a final judgment of the district court in an action for injunctive and declaratory relief aimed at preventing public disclosure of certain documents furnished by Chrysler to federal governmental agencies. The action was originally prompted by the decision of the defendants to honor a request by third parties[2] for public disclosure of the contested documents under the Freedom of Information Act (FOIA).[3] The district court, after a trial *de novo*, permanently enjoined public disclosure of certain portions of the contested documents, but denied the full range of injunctive relief requested by Chrysler, and also denied its request for a declaratory judgment that any future disclosure of similar documents would violate federal law. Chrysler appeals from the denial of the full declaratory and injunctive relief it requested. The federal government defendants in their cross-appeal originally contended (1)

---

[1] James R. Schlesinger, Secretary, United States Department of Defense; Lt. Gen. Wallace Robinson, Director, Defense Supply Agency; Philip J. Davis, Director, Office of Federal Contract Compliance; and John Dunlop, Secretary, United States Department of Labor.

[2] The parties who initially sought disclosure of Chrysler's documents neither intervened nor sought to participate in either the district court proceedings or the proceedings in this court.

[3] 5 U.S.C. § 552 (1970 & Supp. V 1975), as amended by 5 U.S.C. § 552(b)(3) (Supp. 1976), Pub. L. No. 80-554, 80 Stat. 383 (1966).

that Chrysler has no right to judicial review of any agency decision to disclose information requested by third parties under the FOIA; (2) that even if judicial review is available the scope of review is limited to that defined in the Administrative Procedure Act,[4] and does not include a trial *de novo;* and (3) that even if a trial *de novo* was proper the district court erred in enjoining disclosure of portions of the contested documents. After the government's initial brief was filed in this court the Solicitor General, in a petition for a writ of certiorari to review the decision of the Fourth Circuit in *Westinghouse Elec. Corp. v. Schlesinger,* 542 F.2d 1190 (4th Cir. 1976), *cert. denied sub nom. Brown v. Westinghouse Elec. Corp.,* U.S. (1977), took the position that the exceptions to judicial review listed in 5 U.S.C. § 701 were inapplicable to so-called reverse FOIA actions,[5] and that Pub. L. 94-574, 90 Stat. 2721, eliminated federal sovereign immunity as a bar to such review. We have been advised by the Justice Department that it is now the government's position that judicial review is available to parties objecting to disclosure of information under the FOIA, but that the Administrative Procedure Act controls our scope of review. Chrysler contended in the district court, and continues to urge here, that any disclosure of the contested documents was prohibited by several federal statutes to which specific reference will be made hereafter and by the due process clause of the fifth amendment. It maintained in the district court, and urges here, that a trial *de novo* was proper. Because we are in substantial agreement with the government's present position we vacate the judgment of the district court and remand for further proceedings.

---

[4] See 5 U.S.C. § 701 *et seq.*

[5] See n.43 *infra.*

I

The Regulatory Framework

Chrysler is a government contractor. As a condition of its doing business with the government it is required by an Executive Order,[6] and regulations promulgated thereunder by the Secretary of Labor,[7] to employ and treat all employees without regard to race, color, religion, sex, or national origins, and to take affirmative action to eliminate discrimination in employment. In order to monitor compliance with these requirements, federal regulations require that every government contractor or subcontractor with fifty or more employees and a contract valued at $50,000 or more prepare and file an annual Employer Information Report, known as an EEO-1 report.[8] The EEO-1 report contains data on the number of women and minority group members employed. Contractors must also prepare and make available for inspection by appropriate federal agencies an Affirmative Action Program (AAP), providing detailed information on their past and projected employment of women and minority group members.[9] The AAP must contain a "utilization analysis" which describes the occupational levels of minority personnel employed by the contractor and "goals and time tables" by which opportunities for minority group members can be improved.[10] The failure of a contractor to comply with the Executive Order and regulations can result in the cancellation, ter-

[6] Executive Order 11246, 30 Fed. Reg. 12319 (1965), as amended by Executive Order 11375, 32 Fed. Reg. 14304 (1967), 3 C.F.R. 169-177 (1974).

[7] 41 C.F.R. 60-1.1 *et seq.*

[8] *Id.* at 60-1.7(a).

[9] *Id.* at 60-1.40, 60-2.1.

[10] *Id.* at 60-2.10.

mination, or suspension of existing contracts and debarment from future awards.[11]

The Secretary of Labor has delegated administrative responsibility for the enforcement of the Executive Order to the Director of the Office of Federal Contract Compliance (OFCC).[12] The Director of OFCC has designated various federal agencies as "compliance agencies." These compliance agencies have primary responsibility for assuring adherence to the Executive Order by contractors within certain geographic areas or industrial classifications.[13] In Chrysler's case the Defense Supply Agency of the Department of Defense (DSA) is the designated compliance agency. As part of its monitoring duties DSA has conducted "compliance reviews" of Chrysler's employment practices. These reviews consist of an examination of Chrysler's EEO-1 and AAP documents, and on site inspections of its facilities. Compliance reviews result in a compliance review report (CRR), setting forth information supplied by the contractor, an analysis of his performance, and recommendations for sanctions or corrective measures.[14] DSA is also responsible for investigation and resolution of complaints of violations of the Executive Order,[15] and must file a "complaint investigation report" (CIR) with OFCC within sixty days of the receipt of a complaint.[16]

Regulations promulgated by the Secretary of Labor contain rules providing for access by the public to infor-

[11] *Id.* at 60-1.24.

[12] *Id.* at 60-1.2. OFCC is the successor to the President's Committee on Equal Employment Opportunity. *See* 30 Fed. Reg. 12319, 13441.

[13] *Id.* at 60-1.3(d), 60-1.6.

[14] *Id.* at 60-60.9.

[15] *Id.* at 60-1.24(b).

[16] *Id.* at 60-1.24(d).

mation in the records of OFCC or its various compliance agencies.[17]

> The regulations implement 5 U.S.C. § 552, the Freedom of Information Act and supplement the policy and regulations of the Department of Labor, 29 C.F.R. Part 70. It is the policy of the OFCC to disclose information to the public and to cooperate with other public agencies as well as private parties seeking to eliminate discrimination in employment....

41 C.F.R. § 60-40.1. Consistent with the general policy of disclosure to aid in eliminating employment discrimination, the regulations provide:

> [U]pon the request of any person for identifiable records obtained or generated pursuant to Executive Order 11246 (as amended) such records shall be made available for inspection and copying, notwithstanding the applicability of the exemption from mandatory disclosure set forth in 5 U.S.C. 552 subsection (b), if it is determined that the requested inspection or copying furthers the public interest and does not impede any of the functions of the OFCC or the Compliance Agencies except in the case of records disclosure of which is prohibited by law.

41 C.F.R. 60-40.2(a). Thus the regulations contain a blanket waiver of any authority the government might have to resist disclosure of any information which falls into one of the nine categories of information which are exempt from mandatory disclosure under the FOIA.[18]

---

[17] *Id.* at 60-40.1 *et seq.*

[18] In enacting the FOIA Congress recognized that certain types of information, such as trade secrets and other confidential matters, should be exempt from the Act's mandatory public disclosure provisions. Consequently, the FOIA specifically exempts nine categories of information from mandatory disclosure.

This section does not apply to matters that are—

(1)(A) specifically authorize under criteria by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of finan-

OFCC's regulations also provide that ". . . all contract compliance documents within the custody of the OFCC and the Compliance Agencies shall be disclosed upon request unless specifically prohibited by law or as limited elsewhere

herein." 41 C.F.R. § 60-40.2(b). This blanket and mandatory disclosure requirement with respect to compliance documents is qualified in 41 C.F.R. § 60-40.3(a) which lists six categories of documents or parts thereof which "are exempt from mandatory disclosure by the OFCC and the compliance agencies and should be withheld if it is determined that the requested information does not further the public interest and might impede the discharge of any of the functions of the OFCC or the Compliance Agencies." [19] Thus, even information within these six categories

---

cial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

5 U.S.C. § 552(b) (Supp. 1976), amending 5 U.S.C. § 552(b) (1970 & Supp. V 1975).

[19] 41 C.F.R. § 60-40.3(a) provides:

(a) The following documents or parts thereof are exempt from mandatory disclosure by the OFCC and the compliance agencies, and should be withheld if it is determined that the requested inspection or copying does not further the public interest and might impede the discharge of any of the functions of the OFCC or the Compliance Agencies.

(1) Those portions of affirmative action plans such as goals and timetables which would be confidential commercial or financial information because they indicate, and only to the extent that they indicate, that a contractor plans major shifts or changes in his personnel requirements and he has not made this information available to the public. A determination by an agency to withhold this type of information should be made only after receiving verification and a satisfactory explanation from the contractor that the information should be withheld.

(2) Those portions of affirmative action plans which constitute information on staffing patterns and pay scales but only to the extent that their release would injure the business or financial position of the contractor, would constitute a release of confidential financial information of an employee or would constitute an unwarranted invasion of the privacy of an employee.

(3) The names of individual complainants.

(4) The assignments to particular contractors of named compliance officers of such disclosure would subject the named compliance

may be disclosed if OFCC determines that such disclosure is in the public interest and does not impede the discharge of the functions of OFCC or its compliance agencies. Finally, 41 C.F.R. § 60-40.4 [20] provides that EEO-1 reports shall be disclosed, even though the exact same forms are furnished to the Equal Employment Opportunity Commission (EEOC)[21] and EEOC is statutorily prohibited from disclosing EEO-1 reports in its possession.[22]

---

officers to undue harassment or would affect the efficient enforcement of the Executive order.

(5) Compliance investigation files including the standard compliance review report and related documents, during the course of the review to which they pertain or while enforcement action against the contractor is in progress or contemplated within a reasonable time. Therefore, these reports and related files shall not be disclosed only to the extent that information contained therein constitutes trade secrets and confidential commercial or financial information, inter-agency or intra-agency memoranda or letters which would not be available by law to a private party in litigation with the agency, personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, data which would be exempt from mandatory disclosure pursuant to the "informants privilege" or such information the disclosure of which is prohibited by statute.

(6) Copies of preemployment selection tests used by contractors.

[20] 41 C.F.R. § 60-40.4 provides:

> The Standard Form 100 (EEO—1) which is submitted by contractors to the OFCC, a compliance agency or a Joint Reporting Committee servicing both the OFCC and the EEOC shall be disclosed pending further instructions from the Director, OFCC. The statutory prohibition on disclosure set forth in Section 709(e) of the Civil Rights Act of 1964 is limited by the terms of that section to information obtained pursuant to the authority of title VII of that Act and its disclosure by employees of the EEOC.

[21] Employers subject to the provisions of both Executive Order No. 11246 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, are required to file EEO-1 reports with both EEOC (*see* 29 C.F.R. § 1602.7) and OFCC. To facilitate the collection of these reports EEOC and OFCC have established the Joint Report-

The contested documents in this case include Chrysler's EEO-1 reports and information which falls under three of the six exempt categories defined in 41 C.F.R. § 60-40.3(a),[23] namely: (1) those parts of Chrysler's AAP's which contain confidential commercial information indicating that a contractor plans major changes or shifts in his personnel requirements not yet publicly disclosed,[24] (2) those parts of Chrysler's AAP's which set forth staffing patterns and pay scales the release of which would injure the business or financial position of the contractor,[25] and (3) compliance investigation files and related documents to the extent that such information constitutes trade secrets and confidential commercial or financial information.[26]

II

The Agency Proceedings

On May 14, 1975, DSA notified Chrysler that third parties had requested under the FOIA the disclosure of the 1974 AAP of Chrysler's Newark, Delaware assembly plant, and the October 1974 CIR for that facility. Chrysler, on May 23, 1975 objected to the requested disclosure of the AAP, relying on the FOIA exemptions and OFCC disclosure regulations. It also requested a copy of the

---

ing Committee (JRC), which receives and processes these reports, and then distributes a copy of each EEO-1 report both to EEOC and OFCC.

[22] Section 709(c) and (d) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-8(c) and (d) authorize EEOC to collect the data contained in the EEO-1 reports. Public disclosure of such data by EEOC is, however, prohibited by § 709(e), 42 U.S.C. § 2000e-8(e). See text at IV B 2 *infra*.

[23] See n.19 *supra*.

[24] 41 C.F.R. § 60-40.3(a)(1).

[25] *Id.* at § 60-40.3(a)(2).

[26] *Id.* at § 60-40.3(a)(5).

October 1974 CIR, which it had never seen, so that it could determine which parts of it should be treated as confidential. On May 30, 1975, DSA notified Chrysler that it had determined that the Newark AAP and CIR were subject to disclosure under the FOIA and OFCC disclosure rules, that Chrysler would not be furnished with a copy of the CIR prior to disclosure, and that both documents would be disclosed on June 4, 1975.

On July 1, 1975, DSA notified Chrysler that it had received a request under the FOIA for disclosure of the AAP and CRR for Chrysler's Hamtramck, Michigan assembly plant. The July 1 notice indicated that under the recent amendments to the FOIA, Pub. L. 93-502, 5 U.S.C. § 552(a)(6)(A)(i), DSA was required to make a substantive decision on release of these documents within ten working days of receipt of the request, and for that reason could not await the results of an appeal to OFCC under 41 C.F.R. § 60-60.4(d).[27] The DSA letter suggested that any

---

[27] 41 C.F.R. § 60-60.4(d) provides:

(d) *Public access to information.* Information obtained from a contractor under Subpart B will be subject to the public inspection and copying provisions of the Freedom of Information Act, 5 U.S.C. 552. Contractors should identify any information which they believe is not subject to disclosure under 5 U.S.C. 552, and should specify the reasons why such information is not disclosable. The Contract Compliance Officer will consider the contractors claim and make a determination, within 10 days, as to whether the material in question is exempt from disclosure. The contract compliance officer will inform the contractor of such a determination. The contractor may appeal that ruling to the Director of OFCC within 10 days. The Director of OFCC shall make a final determination within 10 days of the filing of the appeal. However, during the conduct of a compliance review or while enforcement action against the contractor is in progress or contemplated within a reasonable time, all information obtained from a contractor under Subpart B except information disclosable under §§ 60-40.2 and 60-40.3 of this chapter is to be considered part of an investigatory file compiled for law enforcement purposes within the meaning of 5 U.S.C. 552(b)(7), and such information obtained from a contractor under Subpart B shall be

comments Chrysler wished to make should be accomplished promptly. Chrysler, by letters dated July 3 and July 11, 1975, objected to the disclosure of the documents relating to its Hamtramck plant, contending that both the AAP and CRR were exempt from disclosure under the FOIA, and also that disclosure of certain information contained in the AAP, including EEO-1 data, was prohibited by 18 U.S.C. § 1905,[28] by § 709(e) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-8(e),[29] and by 44 U.S.C. § 3508.[30] Chrysler's letter also requested a copy of the Hamtramck CRR, which it had never seen. On July 18, 1975, DSA replied in part:

> Full consideration has been given by this agency to your comments and objections. Nevertheless, a determination has been made to release both the Affirmative Action Plan and the Compliance Review Report to the requester, subject to the exceptions noted in the attached list for the reasons given therein. Your assertions of competitive harm were unsupported by any showing of the likelihood of such harm, and only in one context would we agree to the existence of such a likelihood without such a showing. This is reflected in the first ten exceptions on the attached list.
>
> • • •
>
> This decision may be appealed to the Office of Federal Contract Compliance, Washington, D.C. 20210, within 10 days, per 41 C.F.R. 60-60.4. However, due to the time constraints imposed by the recent amendments to the Act (Public Law 93-502), we cannot wait for

---

treated as exempt from mandatory disclosure under the Freedom of Information Act during the compliance review.

[28] See n.44 *infra*.

[29] See n.22 *supra*.

[30] See text at n.85 *infra*.

> the results of such an appeal. Accordingly, the subject documents, with deletions as noted in the attached list, will be released 5 working days after your receipt of this letter.

(JA-100) The July 18 letter also made clear DSA's position that neither 18 U.S.C. § 1905, 42 U.S.C. § 2000e-8(e) nor 44 U.S.C. § 3508 applied to any part of the AAP report, including the EEO-1 data.

III

The District Court Proceedings

Faced with the DSA determination that the FOIA, as amended, prohibited the agency from withholding disclosure while Chrysler exhausted an administrative appeal to OFCC, Chrysler commenced this action in the district court on June 4, 1975. The initial complaint, which was filed before Chrysler learned of the request for disclosure of the Hamtramck documents, only sought injunctive relief against disclosure of the documents relating to the Newark Delaware plant, and a declaratory judgment that public disclosure of any similar documents was prohibited by law. The district court issued a temporary restraining order which prohibited disclosure of the Newark plant documents, and which required the defendants to give Chrysler five days notice prior to the release of any similar documents relating to any of its other facilities. When DSA notified Chrysler of its intention to release the Hamtramck plant documents it amended the complaint to refer to those documents, and obtained from the district court temporary relief covering them as well.

Chrysler's amended complaint contained three counts. First, Chrysler charged that disclosure of any portion of its AAP's, EEO-1's, or of any CIR, or CRR relating to any of its facilities would be unlawful under exemptions (b)(3)(4)(5) and (7) of the FOIA, 5 U.S.C. § 552(b)(3)

(4)(5) and (7),[31] under 42 U.S.C. § 2000e-8(e),[32] under 18 U.S.C. § 1905,[33] and under 44 U.S.C. § 3508.[34] Second, it alleged that such disclosure would be an abuse of agency discretion since it would be contrary to 41 C.F.R. § 60-40.3(a)[35] and 29 C.F.R. §§ 70.21,[36] 70.22,[37] 70.24,[38] and

---

[31] See n.18 *supra*.

[32] See n.22 *supra*.

[33] See n.44 *infra*.

[34] See text at n.85 *infra*.

[35] See n.19 *supra*.

[36] 29 C.F.R. § 70.21 provides:

(a) Pursuant to the provisions of 18 U.S.C. 1905, every officer and employee of the Department of Labor is prohibited from publishing, divulging, disclosing, or making known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with the Department or any agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association. No officer or employee of the Department of Labor shall disclose records in violation of this provision of law.

(b) No records of the Department of Labor with respect to matters specifically required by statute to be kept secret shall be made available for inspection or copying under the provisions of this part. By virtue of the exclusionary language in 5 U.S.C. 552(b)(3) the disclosure requirements of the Freedom of Information Act do not apply to or authorize the disclosure of records with respect to any matters specifically exempted from disclosure by statute.

(c) No records of the Department of Labor with respect to matters specifically authorized under criteria established by Executive order to be kept secret in the interest of the national defense or foreign policy and properly classified pursuant to such order shall be made available for inspection or copying under the provisions of this part. Records concerning such matters are expressly excluded

from the application of the disclosure requirements of the Freedom of Information Act by the provisions of 5 U.S.C. 552(b)(1).

[37] *Id.* at 70.22 provides:

(a) *Records exempt from statutory disclosure requirements.* The Freedom of Information Act, as codified in 5 U.S.C. 552, lists nine categories of records (in 5 U.S.C. 552(b)) to which the disclosure requirements of the statute do not apply. The first and third of these relate to the records described in § 70.21 which are not disclosable because protected from disclosure by the express provisions of a statute or a secret classification authorized by Executive order in the interest of national defense or foreign policy. The other seven categories of records excluded from the statutory disclosure requirements are set forth in §§ 70.23 through 70.28, inclusive. Information from records in these seven categories may, however, be made available for inspection and copying as provided in paragraph (b) of this section.

(b) *Disclosure of protected records; conditions precedent.* Although the Department of Labor is not required by the Freedom of Information Act to make available for inspection or copying any materials or documents included in its records which are within the categories described in 5 U.S.C. 552(b)(2), (4), (5), (6), (7), (8), or (9) (see §§ 70.23-70.28), under the Department's disclosure policy set forth in § 70.11 particular records requested which come within these categories, or portions thereof, shall nevertheless be made available to the extent, but only to the extent, that the appropriate officer authorized to disclose information from Department records determines that the disclosure will further the public interest and will not impede the discharge of any of the functions of the Department of Labor. Such a determination shall be made with due regard not only to the public interest in accessibility to the people of information regarding operations of their Government but also to the public interest in protecting citizens from impairment of their rights to privacy or from harassment, injury, or the dissemination of information concerning them which is privileged or has been submitted by them to the Government on a confidential basis. In determining whether access to such records will be permitted, due consideration shall also be given to the public interest in preventing disclosure of information which would handicap, obstruct, or jeopardize effective performance of the Department's functions under statutes or Executive orders, including its duties with respect to law enforcement.

[38] *Id.* at 70.24 provides:

(a) Pursuant to exemption (4) set forth in 5 U.S.C. 552(b), and as provided in § 70.22, the disclosure from Department of Labor records of matters that are trade secrets, and of commercial and financial information obtained from a person and privileged or confidential, may be refused. Legal requirements of secrecy and prohibitions of disclosure may apply to such records as set forth in § 70.21. Disclosure shall be refused where these mandatory restrictions apply to the records sought. Even where denial of access is not required by these restrictions, access to records exempted from the disclosure requirements by exemption (4) cannot be granted under the policy expressed in §§ 70.11 and 70.22 unless the disclosure officer, in balancing the right of the public to know how the Government operates against the need of the Government to keep information in confidence and the right of the person from whom it was obtained to have privileges and confidences respected, is able to determine that disclosure will serve the public interest and not impede the discharge of any function of the Department of Labor.

(b) The intent of the examination set forth in paragraph (a) of this section to protect privileged or confidential information is, according to the committee reports in both Houses of Congress, not restricted to the trade secrets and commercial or financial information specifically mentioned in the statute. Information the disclosure of which may be refused pursuant to this exemption is, according to the legislative history, intended to include information customarily subject to a doctor-patient, lawyer-client, or other such privilege.

(c) Information "obtained from any person" would include information obtained from a person inside as well as outside the Government. The applicability of this exemption does not depend on whether the record contains information obtained from the public at large, from a particular person, from within the Department, or from another agency. While information which is confidential in the hands of one agency retains its protected character in the hands of agencies to which it is subsequently furnished, the exemption does not sanction the rendering of documents confidential by the expedient of transferring them among agencies.

(d) Except as otherwise provided in this part (e.g., § 70.13), disclosure in certain circumstances may be refused of material such as formulae, designs, drawings, research data, and the like, which are significant not as records but as items of valuable property. These may have been developed by or for the Government for its use and at its expense. Nothing in the legislative history suggests that the Freedom of Information Act was intended to give away

such valuable property to any person willing to pay the price of making a copy. Where similar property in private hands would be held in confidence, the public interest would appear to require that such property in the hands of an agency should be protected under exemption (4).

(e) This exemption is further intended to extend protection to other information in Government records which has been furnished and accepted in confidence and which would not customarily be released to the public by the person from whom the Government obtained it. See, for example, the House Report (H. Rept. 1497, 89th Cong., 2d Sess.) and the President's signing statement. Accordingly, the exemption assures the confidentiality of information thus obtained by the Department of Labor through questionnaires and required reports to the extent that the information would not customarily be made public by the person from whom it was obtained. Nothing in the Freedom of Information Act necessitates a disregard of the right of individuals or groups to rely in good faith on an understanding of confidentiality for which a Government agency has reasonably afforded a basis. Maintenance of citizens' respect for governmental fairness requires that such understanding be given due consideration. At the same time, Department representatives should be alert to discourage the development of such understandings where not clearly warranted by departmental responsibilities.

(f) Pursuant to exemption (8) set forth in 5 U.S.C. 552(b), and as provided in § 70.22, the disclosure from Department of Labor records of any matter contained in, or related to, examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions, may be refused. Exemption (8) emphasizes the application to financial institutions of the protection from disclosure afforded by the exemption set forth in paragraph (a) of this section, and makes plain the intent to protect information relating to such institutions which may be prepared for or used by any agency responsible for the regulation or supervision of such institutions. Access to any such information in records of the Labor Department will be refused where disclosure is not legally permitted or where a determination to disclose is inappropriate for reasons discussed in paragraph (a) of this section. In cases where another agency is concerned with information protected by exemption (8) in 5 U.S.C. 552(b) which is sought from records of the Department, the provisions of § 70.31 are also applicable.

70.31.[39] Third, it contended that the FOIA and OFCC disclosure rules as applied to Chrysler violate due process in that they afford no meaningful right to be heard initially or on appeal before disclosure of Chrysler's confidential information. By a stipulation and consent order the *pendente lite* restraints were continued until final hearing. In its pre-trial papers the government defendants objected to the court's jurisdiction and to the holding of an evidentiary hearing. The court reserved decision on these objections until a decision on the merits. Trial on the merits was held on August 25 and 26, 1975 and thereafter the parties filed a detailed "Stipulation of Facts and Issues."

The district court's opinion correctly holds that there is subject matter jurisdiction under 28 U.S.C. § 1331(a).[40] On the merits the court found that part of the information the agency proposed to release, described generically as the "manning tables,"[41] was confidential commercial in-

---

[39] *Id.* at 70.31 provides:

If the release of a record in custody of the Department of Labor would be of concern not only to the Department but also to another Federal agency, the record will be made available by the Department only if its interest in the record is the primary interest and only after coordination with the other interested agency. If the interest of the Department in the record is not primary, the request will be transferred promptly to the agency having the primary interest, and the applicant will be so notified. The release of information received from another agency and the release to another agency of information collected from persons outside the Government shall be subject to the conditions and restrictions imposed by 44 U.S.C. 3508.

[40] *E.g.*, Planning Research Corp. v. F.P.C., 555 F.2d 970 (D.C. Cir. 1977); Westinghouse Elec. Corp. v Schlesinger, supra, 542 F.2d at 1209-10; Sears, Roebuck & Co. v. General Services Administration, Civ. No. 75-2127, Slip op. at 3 & n.6 (D.C. Cir. filed April 1, 1977); see Bachowski v. Brennan, 502 F.2d 79, 82 (3d Cir. 1974), *rev'd on other grounds*, 421 U.S. 560 (1975); cf. Califano v. Sanders, 45 U.S.L.W. 4029 (U.S. February 23, 1977).

[41] The district court described the manning tables as lists of

formation, the release of which could cause Chrysler substantial competitive harm.[42] On the basis of this finding the court concluded that the manning tables constituted information falling within exemption (b)(4) of the FOIA, and was therefore exempt from its mandatory disclosure provisions. The court then reasoned that since the manning tables constituted exempt information under the FOIA, whether DSA possessed the power to disclose these documents was to be determined by reference to other federal disclosure statutes, apart from the FOIA. Thus the court rejected Chrysler's argument that the FOIA creates a so-called reverse FOIA cause of action based on the theory that Congress, by exempting certain information from mandatory disclosure, intended to absolutely prohibit all agency disclosure of such exempt information under any circumstances.[43] Instead, the court held that 18 U.S.C. § 1905,[44] a criminal statute, made it a crime for a

---

Chrysler's internally used job titles and the number of people who perform each job.

[42] In reaching this conclusion the court relied on the testimony of Chrysler's witnesses, rather than on the rather spare administrative record.

[43] *See generally*, Clement, The Rights of Submitters to Prevent Agency Disclosure of Confidential Business Information: The Reverse Freedom of Information Act Lawsuit, 55 Texas L.R. 587 (1977); Note, Reverse-Freedom of Information Act Suits: Confidential Information in Search of Protection, 70 Nw. U.L. Rev. 995 (1976); Note, Protection From Government Disclosure—The Reverse-FOIA Suit, 1976 Duke L.J. 330.

[44] 18 U.S.C. § 1905 provides:

> Whoever, being an officer or employee of the United States or of any department or agency thereof, publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or

government employee to disclose the manning tables. Observing that the Secretary of Labor, on the authority of 5 U.S.C. § 301,[45] a general statute providing for the use and custody of government records, promulgated 29 C.F.R. § 70.21(a),[46] which forbids disclosure of confidential information the release of which would violate 18 U.S.C. § 1905, the court concluded that DSA was acting in violation of its own regulations and contrary to law. Thus it construed what it held to be DSA's governing regulation as consistent with 18 U.S.C. § 1905. It issued the injunction appealed from on the authority of 5 U.S.C. § 706(2)(A) to prevent agency action "not in accordance with law." The court also held that 42 U.S.C. § 2000e-8(e) was inapplicable, and rejected Chrysler's due process contentions.

IV

Discussion

This case is one of a burgeoning number growing out of the conflict between the demands of federal regulatory agencies, as a necessary by-product of their regulatory activities, for the submission by private businesses of detailed financial, commercial and employee information, which would not voluntarily be disclosed to competitors, and the public access to most information in federal

relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined not more than $1,000, or imprisoned not more than one year, or both; and shall be removed from office or employment.

[45] See text following n.69 *infra*.

[46] See n.36 *supra*.

agency files which is mandated by the FOIA. It is, however, the first occasion which requires this Court to consider a reverse FOIA case, in which a corporate plaintiff (the submitter) seeks to enjoin an agency from disclosing submitter-generated business information.[47] The case presents several important issues about agency management of such information, about agency discretion to disclose information in the public interest, about submitter rights prior to disclosure and about the availability of remedies for the prevention of disclosure.

The FOIA requires agencies to disclose upon request any information not falling within one of nine specifically exempted categories.[48] The arguments of Chrysler and other corporate submitters seeking to prevent disclosure break down into three broad categories. First, Chrysler and others have urged that the FOIA itself both prohibits agency disclosure of information falling within any of the nine exemptions and affords an implied cause of action for injunctive or declaratory relief to prevent such disclosure. Second, they have claimed that even if the FOIA does not prohibit agency disclosure of exempt FOIA information, other statutes, such as 18 U.S.C. § 1905 and 42 U.S.C. § 2000e-8(e) do so, and afford an implied cause of action. Third, they contend that disclosure of submitter-generated business information that is exempt under the FOIA or protected by some other federal statute or regulation is an abuse of agency discretion subject to judicial review under the Administrative Procedure Act at the behest of a submitter adversely affected by such agency action. The first two categories would afford relief in the form of a trial *de novo*, while in the third judicial review would be limited to that available under 5 U.S.C. § 706. The posture

[47] *But cf.* Westinghouse Elec. Corp. v. United States Nuclear Regulatory Comm'n, 555 F.2d 82, 93-94 (3d Cir. 1977).

[48] See n.18 *supra*.

of this appeal and cross-appeal requires that we address each theory on which a reverse FOIA action could be founded.

A. *The Freedom of Information Act*

The FOIA expressly creates a cause of action in favor of requesters of information to enjoin federal agencies from withholding information.[49] It does not by its terms provide a cause of action for submitters of information to prevent disclosure. But while there is no express provision for an action by submitters, the FOIA's nine categories of exempt information [50] disclose a Congressional concern that disclosure of certain information might injure interests in privacy or confidentiality which may be as important as the public's right to general access to agency information. The fourth FOIA exemption, for example, covers "trade secrets and commercial or financial information obtained from a person and privileged or confidential." [51] There is ample Congressional history suggesting that Congress sought to afford some protection of submitters' interest in the confidentiality of such information.[52] Moreover we recognize that disclosure of submitter information is qualitatively different from disclosure of data directly relating to government operations, and that the interest in privacy appears stronger with respect to the former than the latter. But while the Congressional concern over confidentiality of submitter information is clear, an intention to make mandatory the nondisclosure of exempt information is less so, and the evi-

---

[49] 5 U.S.C. § 552(a)(4)(B) (Supp. V 1975).

[50] See n.18 *supra*.

[51] *Id.*

[52] *See, e.g.*, S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965); H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10, reprinted in 2 U.S. Code Cong. & Ad. News 2418, 2427 (1966).

dence of an intent to create a submitter cause of action is practically nonexistent.

Among the circuits which have considered the issue the District of Columbia [53] and the Fifth Circuits [54] have held that the FOIA exemptions are permissive and do not mandate agency withholding of exempt information. The Fourth Circuit has held that the exemptions mandate nondisclosure.[55] The Ninth Circuit, while first holding that the exemptions are mandatory, on rehearing withdrew that part of its opinion as premature.[56] The closest the Supreme Court has come to addressing the issue is the statement in *E.P.A. v. Mink,* 410 U.S. 73, 80 (1973), that the FOIA exemptions "represent[s] the congressional determination of the types of information that the Executive Branch must have the option to keep confidential, if it so chooses." [57] In our view, none of the opinions referred to contains a complete analysis of the myriad problems presented in reverse FOIA cases.

We conclude that Congress in the FOIA intended neither that the exemptions make non-disclosure mandatory nor that they provide the predicate for an implied cause of action. The two questions are interdependent,

---

[53] Charles River Park "A", Inc. v. Department of HUD, 519 F.2d 935 (D.C. Cir. 1975).

[54] Pennzoil Co. v. FPC, 534 F.2d 627 (5th Cir. 1976).

[55] Westinghouse Elec. Corp. v. Schlesinger, 542 F.2d 1190 (4th Cir. 1976), *cert. denied sub nom.* Brown v. Westinghouse Elec. Corp., U.S. (1977) (apparently overruling Moore-McCormack Lines, Inc. v. I.T.O. Corp., 508 F.2d 945, 950 (4th Cir. 1974)).

[56] Union Oil Co. of California v. FPC, 542 F.2d 1036, 1045 (9th Cir. 1976).

[57] *See* FAA Administrator v. Robertson, 422 U.S. 225, 262, 269 n.1 (1975); Department of the Air Force v. Rose, 425 U.S. 352, 361 (1976).

since it would obviously be difficult to imply a cause of action under the FOIA to bar government officials from releasing information the disclosure of which Congress intended to leave to agency discretion or other federal disclosure statutes. Both the plain language of § 552(b)[58] and the Congressional reports and debates suggest that no more was intended than a discretionary exception to the general mandatory duty of disclosure.[59] Nor can we ignore the contrast between the FOIA's express grant of a cause of action for requesters of information[60] and its silence respecting submitter relief. Moreover, we note that when Congress in the Prvacy Act of 1974[61] decided to create a civil cause of action to enjoin agency disclosure of FOIA exempt information it did so explicitly. *See* 5 U.S.C. § 552a(g)(1) (Supp. V 1975). But only private persons, not business entities were afforded this protection.[62] Fi-

[58] The subsection of the FOIA dealing with exempt information only states that the Act's mandatory disclosure requirement "does not apply to matters that are" within the nine exempt categories. See n.18 *supra*.

[59] *E.g.*, H. Rep. No. 1497, *supra* n.52, at 2, 5-7, reprinted in 2 U.S. Code Cong. & Ad. News 2418, 2419, 2422-24 (1966); S. Rep. No. 813, *supra* n.52, at 10; 112 Cong. Rec. 13641 (remarks of Representative Moss, sponsor of the FOIA in the House). ***But see id.*** at 13,645 (remarks of Representative King), 13649 (remarks of Representative Fascell).

[60] See n.49 *supra*.

[61] Pub. L. 93-597, 88 Stat. 1896, codified at 5 U.S.C. § 552a(b) (Supp. V 1975). The Privacy Act covers exempt FOIA information which relates to individuals and provides that "[n]o agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to any other agency, except pursuant to a written request by, or with the prior insert of, the individual to whom the record pertains . . . ."

[62] The Senate Report to the Privacy Act states that the Act is intended to

> "distinguish between the rights which are given to the citizen as an individual under this Act and the rights of proprietorships, businesses and corporations which are not intended to be covered by this Act. This distinction was to insure that the bill leaves untouched the Federal Government's information activities for such purposes as economic regulations."

S. Rep. No. 1183, 93d Cong., 2d Sess. 79 (1974).

nally, we think that judicial reconstruction of the statute to imply from the exemptions either a mandatory duty of non-disclosure or a cause of action to prevent disclosure, would be inconsistent with the basic purpose of the FOIA, which was not to afford confidentiality, but to overcome restrictive agency interpretations of the original public information section of the Administrative Procedure Act.[63] The general philosophy reflected in the FOIA is that of full agency disclosure to provide the public with speedy access to relevant information.[64] Recognizing an implied cause of action to prevent agency disclosure of exempt FOIA information would, we think, be inconsistent with that general philosophy, since it would place in the hands of interested submitters of information, rather than those of presumably disinterested governmental officials, the authority to take steps which might impede the dissemination of information of public importance. Thus we hold that the FOIA's language, legislative history, and philosophy of full disclosure bar a construction of the Act which mandates agency withholding of exempt information or recognizes an implied cause of action to prevent the disclosure of such information.

B. *Other Non-Disclosure Statutes*

Although we conclude that the FOIA does not limit the discretionary power of federal agencies to disclose exempt

[63] *See* S. Rep. No. 813, *supra* n.52, at 4, S. Rep. No. 93-854, 93d Cong., 2d Sess. at 6 (1974); H. Rep. No. 1497, *supra* n.52, at 4-5, reprinted in 2 U.S. Code Cong. & Ad. News 2418, 2421-22 (1966); H.R. Rep. No. 93-221, 93d Cong., 1st Sess. at 59-60 (1973).

[64] *Id.*

FOIA information, we recognize that the exercise of this discretionary authority may be prohibited, or substantially curtailed, by other federal non-disclosure statutes.[65] *See FAA Administrator v. Robertson, supra,* 422 U.S. at 264-66. Chrysler contends that apart from the FOIA, at least three non-disclosure statutes prohibit DSA from releasing the contested documents. Our consideration of that contention requires, with respect to each statute, the same dual inquiry we made respecting the FOIA: (1) does the statute forbid disclosure of the documents in issue; and (2) if so, can a private cause of action be implied from it.

1. 18 U.S.C. § 1905

The statute on which Chrysler and most other reverse FOIA plaintiffs[66] place principal reliance is 18 U.S.C. § 1905. On its face, this broadly worded criminal statute encompasses virtually every category of business information likely to be in the files of any federal agency.[67] However, in *Westinghouse Elec. Corp. v. Nuclear Regulatory Commission, supra,* we noted that § 1905's broad non-disclosure prohibitions apply only to disclosures "not authorized by law," and held that information disclosed pursuant to a validly enacted agency regulation is authorized by law.[68] Chrysler urges that in *Westinghouse* we erred, that an agency regulation does not have the force of law for purposes of § 1905, and that only specific Congressional statutes can authorize the release of information covered by § 1905. Moreover, it urges that even assuming the correctness of *Westinghouse,* disclosures

[65] For a compilation of federal non-disclosure statutes see Clement, *supra* n.43, at 598 n.40.

[66] *See, e.g.,* Westinghouse Elec. Corp. v. Schlesinger, *supra* n.55; Charles River Park "A", Inc., *supra* n.53.

[67] See n.44 *supra* for text.

[68] 555 F.2d at 94.

pursuant to the OFCC disclosure regulations are not authorized by law for purposes of § 1905, because these regulations were adopted under the authority of 5 U.S.C. § 301, and Congress intended that § 301 not be used to limit the scope of § 1905.

While our discussion of the scope of the "not authorized by law" qualification to § 1905 in *Westinghouse* was not extended, we are confident that the holding is correct. In *Westinghouse* we found authority for the promulgation of the Nuclear Regulatory Commission's disclosure regulations in that agency's Congressionally enacted enabling act. That holding was consistent with those of the Supreme Court in cases involving the disclosure of information by other federal agencies.[69] Though OFCC has no statutory enabling act, it is authorized to promulgate disclosure regulations under the so-called housekeeping statute, 5 U.S.C. § 301, which provides in part:

> The head of an exclusive department or military department may prescribe regulations for . . . the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public.

Section 301 can be traced to the Act of July 27, 1789, Ch. 4, § 4, 1 Stat. 28, dealing with records of the State Department and the Act of August 7, 1789, Ch. 7, § 4, 1 Stat. 49, dealing with records of the War Department. Various housekeeping statutes were collected and codified in 1874,[70] and, as codified, granted authority to prescribe disclosure

[69] *See, e.g.,* FCC v. Schreiber, 381 U.S. 279, 289-94 (1965); Isbrandtsen-Mollen Co. v. United States, 300 U.S. 139 (1937); Norwegian Nitrogen Co. v. United States, 288 U.S. 294 (1933).

[70] *See* Revised Statutes of the United States § 161 (1st ed. 1873-1874).

regulations. The present version, and in particular the last sentence, was enacted in 1958.[71] The legislative history makes clear that the addition of the last sentence was aimed at stopping agencies from relying on the housekeeping statute as authority to deny the requests of citizens for information.[72]

In *Non-Resident Taxpayers Ass'n v. Municipality of Philadelphia,* 478 F.2d 456 (3d Cir. 1973), we held that § 301 authorized a Bureau of the Budget circular that instructs executive departments to furnish information to state and local taxing authorities regarding compensation paid to federal employees. Such a disclosure, absent the regulation, would clearly conflict with the broad language of § 1905. Thus, although we did not expressly address § 1905 in *Non-Resident Taxpayers Ass'n,* the holding is consistent with our conclusion in *Westinghouse,* that disclosures pursuant to validly adopted agency regulations are not subject to the strictures of § 1905.

We have been referred to no legislative history suggesting that § 1905, a 1948 codification of a group of statutes applicable to specific agencies,[73] was intended to

---

[71] Act of Aug. 12, 1958, Pub. L. No. 85-619, 72 Stat. 547.

[72] *See* S. Rep. No. 1621, 85th Cong., 2d Sess. 3-4 (1958); H.R. Rep. No. 1461, 85th Cong., 2d Sess. 2 (1958).

[73] *See* Act of June 25, 1948, ch. 645, § 1905, 62 Stat. 683 (codified at 18 U.S.C. § 1905 (1970). The Revisers Notes in the House report, H.R. Rep. No. 304, 80th Cong. 1st Sess. A127-A128 (1947), accompanying the 1948 revision of the Criminal Code states that § 1905 consolidated an income tax statute, 18 U.S.C. § 216 (1940), a Tariff Commission Statute, 19 U.S.C. § 1335 (1940), and a Commerce Department statute, 15 U.S.C. § 176a (1940). The Consumer Federation of America urges in its amicus brief that § 1905 should be interpreted narrowly, and consistent with interpretations of these three predecessor statutes. *See, e.g.,* United States v. Cook, 384 U.S. 257 (1966). The basis of our decision in this case precludes consideration of that contention. For an excellent discussion of the legislative history of § 1905 and its predecessor statutes see Clement, *supra* n.43, at 607-617.

limit the longstanding rulemaking authority under the 1874 codification of the housekeeping statute. Nor do we attach to the statement of Congressman Moss, respecting the 1958 amendment to the housekeeping statute (adding the last sentence of § 301), the same significance as the District of Columbia Circuit in *Charles River Park "A", Inc. v. Department of HUD, supra,* 519 F.2d at 942-43. Relying on Congressman Moss' statement that the 1958 amendment "does not affect the confidential status of information given to the government and carefully detailed in Title 18, United States Code, Section 1905 . . .",[74] that court concluded that "§ 301 does not authorize regulations limiting the scope of § 1905."[75] In doing so, however, the court took the statement out of context. Congressman Moss only stated that the amendment would not affect the confidential status of information covered by § 1905. He did not say that the amendment eliminated disclosure authority existing since 1789, or that it eliminated the "authorized by law" qualification in § 1905. Such an interpretation of the 1958 amendment is totally at odds with its central purpose—the elimination of governmental secrecy[76]—as it would transmogrify § 1905 into a weapon for those parties who advocate government secrecy. Thus we adhere to the position we took in *Non-Resident Taxpayers Ass'n,* that § 301 is a separate source of agency authority for the promulgation of disclosure regulations, and disclosures pursuant to such regulations are authorized by law and immune from the prohibitions of § 1905. Since the OFCC disclosure regulations are valid under § 301, all disclosures pursuant to those regulations are authorized by law and therefore not subject to § 1905.

Since we find authority for the promulgation of the OFCC disclosure regulations in § 301 we need not consider

---

[74] 104 Cong. Rec. 6550 (1958).

[75] 519 F.2d at 942-43.

[76] *See* n.72 *supra.*

whether the FOIA itself, properly construed, is an independent source of authority for the promulgation of disclosure regulations for exempt information."[77] Nor need we decide whether absent § 301, Executive Order 11246, which confers authority on the Secretary of Labor to adopt "such rules and regulations . . . as he deems necessary to achieve the purposes of the order",[78] is a separate source of authority for such promulgation. Our deferment of these grounds for sustaining the regulations should not be considered an expression of doubt as to these sources of authority, but only of confidence in our prior § 301 holding.

Even if we were incorrect in the *Westinghouse* holding that agency regulations are laws for purposes of the qualification to § 1905 we would, in any event, reject the proposition that § 1905 would serve as a predicate for a private civil cause of action. Recent pronouncements of the Supreme Court have severely limited the circumstances in which a federal court may imply a private cause of action from a federal statute.[79] Whatever the merits of this trend, the decisions bind us. Here the criminal statute provides for a fine of not more than

---

[77] *See* General Services Administration v. Benson, 415 F.2d 878, 880 (9th Cir. 1969). A number of federal agencies in addition to OFCC have promulgated such regulations. See 28 C.F.R. § 16.1(a) (1976) (Justice Depart.); 43 C.F.R. § 2.13(d) (1976) (Interior Dept.); 45 C.F.R. § 4.74 (1976) (H.E.W.); 29 C.F.R. § 70.11(b) (1976) (Labor Dept.); 24 C.F.R. § 15.21 (1976) (HUD); 49 C.F.R. § 7.51 (1976) (Transportation Dept.); 32 C.F.R. § 286.4(b) (Defense Dept.); 41 C.F.R. § 105-60.104-2 (1976) (GSA); 39 Fed. Reg. 44,602 (1974) (FDA); 39 Fed. Reg. 30, 298 (1974) (Consumer Product Safety Commission).

[78] *See* n.6 *supra*.

[79] *See, e.g.*, Cort v. Ash, 422 U.S. 66 (1975), Securities Investors Protection Act v. Barbour, 421 U.S. 412 (1975); National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453 (1974).

$1000, imprisonment for not more than a year, and automatic removal from office upon conviction. The adequacy of these penalties would seem to assure the achievement of the Congressional objectives underlying § 1905. The very breadth of the prohibitions in § 1905 militates against opening the courts to civil suits which may involve substantial problems of construction. Moreover, as we hold hereafter, there is an available remedy under the Administrative Procedure Act, in which judicial review will be enlightened by agency interpretation. We do not believe we can properly imply a cause of action, and thus the right to a trial *de novo*, from § 1905.

2. 42 U.S.C. § 2000e-8(e)

Section 709(e) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-8(e), is a criminal statute making it unlawful

> "for any officer or employee of [EEOC] to make public in any manner whatever any information obtained by [EEOC] pursuant to its authority under this section prior to the institution of any proceeding under this subchapter involving such information."

Like § 1905, the maximum fine is $1000 and the maximum imprisonment one year. And, as with § 1905 and the FOIA, we must determine both whether the prohibition in § 709 (e) applies and, if it does, whether a private cause of action for its enforcement may be implied. By its terms § 709(e) applies only to employees of EEOC, and only to information obtained by that agency on its own statutory authority. Since it is a criminal statute, ordinary rules of construction would seem to preclude its application, at least in a criminal enforcement context, to officers or employees of a different agency or to information obtained by a different agency under that agency's separate authority. Two circuits have concluded that OFCC compli-

ance agencies are not governed by the § 709(e) prohibition.[80] Chrysler argues that those cases were wrongly decided, first because OFCC and EEOC are performing identical antidiscrimination functions, and second, because the EEO-1 reports are filed initially with the Joint Reporting Committtee,[81] which it describes as the alter ego of EEOC.

It has long since been settled in this circuit that the federal government's antidiscrimination effort directed at government contractors rests upon a different authority, and even serves a different, though complementary, purpose that the efforts of EEOC.[82] The Executive Order program antedated the passage of Title VII, and Congress has rejected proposals to transfer the Executive Order functions of OFCC to EEOC.[83] The two agencies function independently, and we decline the invitation to disregard that independence in order to read § 709(e) as applicable to OFCC compliance agencies such as DSA.

The argument that the Joint Reporting Committee (JRC) is the alter ego of EEOC, and that all EEO-1 forms

---

[80] Westinghouse Elec. Corp. v. Schlesinger, 542 F.2d 1190, 1199 (4th Cir. 1976), *cert. denied sub nom.* Brown v. Westinghouse Elec. Corp. U.S. (1977); Sears, Roebuck and Co. v. General Services Admin., 509 F.2d 527, 529 (D.C. Cir. 1974). *But cf. Chamber of Commerce v. Legal Aid Society*, 423 U.S. 1309 (1975) (Douglas, J., denying motion for a stay).

[81] See n.21 *supra*.

[82] Contractors Ass'n of Eastern Pa. v. Secretary of Labor, 442 F.2d 159, 173 (3d Cir. 1971), *cert. denied*, 404 U.S. 854 (1971); EEOC v. AT&T, Civ. Nos. 76-2217, 76-2281, 76-2285 (3d Cir. filed April 22, 1977), 45 U.S.L.W. 2508 (1977), petition for cert. filed 45 U.S.L.W. (1977).

[83] *Compare* H. Rep. No. 92-238, 92d Cong. 2d Sess., reprinted in U.S. Code Cong. & Ad. News, 2137, 2150 (1972) (suggesting the transfer of OFCC to EEOC) *with* the final version of the 1972 amendments to Title VII, Pub. L. 92-261, 86 Stat. 104.

filed with JRC must therefore fall within § 709(e) is no more persuasive. The JRC is a consequence of the 1972 amendments to Title VII which established the Equal Employment Opportunity Coordinating Council, 42 U.S.C. § 2000e-14. The Coordinating Council is responsible for, among other things, implementing inter-agency agreements to eliminate duplication among the operations, functions and jurisdictions of various federal agencies enforcing federal antidiscrimination employment policies. JRC was organized by the Coordinating Council to streamline the collection of employment discrimination information and to distribute it, without the necessity for multiple filings, to the separate agencies involved.[84] It is clear that JRC is the agent of several enforcement authorities. Nevertheless, nothing in 42 U.S.C. § 2000e-14 or in the implementing regulations which created JRC suggests an intention to extend the applicability of § 709(e) to federal employees outside EEOC or to information possessed by other agencies on their own authority.

Even assuming the applicability of § 709(e) to DSA, we are no more persuaded that a private cause of action can be implied from this criminal statute than from § 1905. The same reasons for our rejection of a private cause of action implied from § 1905 apply to § 709(e), and we will not repeat them. Chrysler's argument for a right to a trial *de novo* based on § 709(e) of Title VII is rejected.

3. 44 U.S.C. § 3508

Section 423 of the Federal Reports Act of 1942,[85] now codified as 44 U.S.C. § 3508 [86] provides:

---

[84] *See, e.g.*, 41 C.F.R. 60-40.4.

[85] Pub. L. 77-831, ch. 811, § 4, 56 Stat. 1079. This act was designed to minimize the burden and expense to citizens of complying with multiple government requests for information and to eliminate unnecessary duplication of reporting requirements. *See* 88 Cong. Rec. 9165 (Nov. 27, 1942).

[86] Pub. L. 90-620, 82 Stat. 1304.

(a) If information obtained in confidence by a Federal agency is released by that agency to another Federal agency, all the provisions of law including penalties which relate to the unlawful disclosure of information apply to the officers and employees of the agency to which information is released to the same extent and in the same manner as the provisions apply to the officers and employees of the agency which originally obtained the information. The officers and employees of the agency to which the information is released, in addition, shall be subject to the same provisions of law, including penalties, relating to the unlawful disclosure of information as if the information had been collected directly by that agency.

(b) Information obtained by a Federal agency from a person under this chapter may be released to another Federal agency only—

(1) in the form of statistical totals or summaries; or

(2) if the information as supplied by persons to a Federal agency had not, at the time of collection, been declared by that agency or by a superior authority to be confidential; or

(3) when the persons supplying the information consent to the release of it to a second agency by the agency to which the information was originally supplied; or

(4) when the Federal agency to which another Federal agency releases the information has authority to collect the information itself and the authority is supported by legal provision for criminal penalties against persons failing to supply the information.

Chrysler argues that by virtue of the second sentence in § 3508(a) the employees of DSA are subject to the criminal provisions of § 709(e) of Title VII, even though that criminal statute would otherwise be applicable only to EEOC employees. This argument, however, assumes that DSA obtained the information in question from EEOC. Clearly that is not the case with respect to the AAP's, the CIR's, or the CRR's. Though DSA and EEOC both obtain Chrysler's EEO-1 reports from the JRC, in the preceding subsection we rejected Chrysler's contention that the JRC is an alter ego of EEOC, rather than a collection agent of both EEOC and OFCC. Since DSA did not obtain the EEO-1 reports from EEOC, but instead, obtained this information on its own behalf in the first instance, § 3508(a) does not apply. *Sears, Roebuck & Co. v. GSA*, 509 F.2d 527, 529 (D.C. Cir. 1974). Nor may Chrysler argue that the provisions of § 3508(b) prohibit DSA from publicly disclosing the contested documents, since this subsection only governs inter-agency transfers of information, and is not applicable to agency decisions to disclose information to the general public.

We hold that § 3508 is entirely inapplicable to the case before us. Whether this statute, which contains no sanctions, would support an implied private cause of action to prevent inter-agency transfers of information in violation of its terms is a question of some difficulty, which we do not here decide.

C. *The Administrative Procedure Act*

The government first took the position that there could be no judicial review, on behalf of a submitter, of an agency decision to release information requested by third parties under the FOIA. It now concedes that judicial review pursuant to the Administrative Procedure Act (APA) is available because a submitter may be "[a] person suffering legal wrong because of agency action . . . within the meaning of a relevant statute."[87] In light of that con-

[87] 5 U.S.C. § 702 (1970). See text following n.4 *supra*.

cession there is no need to expound at length on the reasons why we agree with those courts which have held that the APA provide a cause of action for enjoining an agency from disclosing submitter-generated information.[88] The district court rejected the government's first position and held that judicial review was available under the APA. But while we agree with that ruling we have some difficulties with its application in this case.

Our first difficulty is with the district court's holding that DSA, in its decision to disclose the manning tables, which the court viewed as confidential data, was acting in violation of its own regulations, 29 C.F.R. § 70.21(a),[89] and thus "not in accordance with law."[90] Although 29 C.F.R. § 70.21(a) is modeled after the criminal disclosure prohibitions in 18 U.S.C. § 1905,[91] it, like § 1905, only prohibits disclosures "not authorized by law." Since we have held that any disclosures pursuant to the OFCC disclosure regulations are authorized by law, the prohibitions in 29 C.F.R. § 70.21(a) are not applicable to this case.

Our second difficulty with the decision concerns the proper scope of judicial review under the APA. In reaching its decision the district court held a trial *de novo* on the merits of Chrysler's assertions and relied heavily on the trial testimony of Chrysler's witnesses in reaching the determination that the manning tables constituted confidential data which DSA could not disclose. Judicial review under the APA ordinarily is limited to a "review of the

---

[88] *See, e.g.*, Charles River Park "A", Inc., *supra*, 519 F.2d at 941 n.6; Pennzoil Co. v. F.P.C., *supra*, 534 F.2d at 631-32 (5th Cir. 1974); GTE Sylvania, Inc. v. Consumer Product Safety Commission, 404 F. Supp. 352, 366-67 (D. Del. 1975).

[89] See n.36 *supra* for text.

[90] 5 U.S.C. § 706(2)(A) (1970).

[91] *Compare* 18 U.S.C. § 1905, *supra* at n.44, *with* 29 C.F.R. § 70.21(a), *supra* at n. 36.

whole [agency] record or parts of it cited by a party."[92] That rule is not inflexible, for certainly evidence may be taken in connection with an application under 5 U.S.C. § 705 for relief pending review. Moreover, the Supreme Court has approved *de novo* rather than agency record review (a) when the agency's action is either adjudicatory in nature and its factfinding procedures are inadequate, or (b) when issues that were not before the agency are raised in a proceeding to enforce nonadjudicatory agency action.[93] In this case, however, the district court relied on the testimony of trial witnesses not merely to decide the question of relief pending review, but also to decide the substantive merits. And in reaching the merits the court did not address the question whether an agency disclosure decision pursuant to the FOIA or agency disclosure regulations was adjudicatory, and if so, whether the agency's procedures on which the disclosure decision was based were adequate.[94]

Chrysler, relying on *Sears, Roebuck & Co. v. General Services Administration*, Civ. No. 75-2121, Slip Op. at 4-5 (D.C. Cir. filed April 1, 1977), urges that regardless of the judicial review provisions of the Administrative Procedure Act the Declaratory Judgment Act, 28 U.S.C. § 2201, provides separate authority for the district court to hold a *de novo* hearing. That argument, however, would be equally applicable to every agency review case, and the Declaratory Judgment Act so construed would eliminate the effect of the later enacted Administrative Procedure Act. The Supreme Court stated in *Public Serv. Comm'n v. Wycoff Co.*, 344 U.S. 237, 246 (1952), that "the declara-

---

[92] 5 U.S.C. § 706 (1970).

[93] Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415 (1971).

[94] Neither party contends that the district court was presented with any issues not before DSA.

tory judgment procedure will not be used to pre-empt and prejudge issues that are committed for initial decision to an administrative body or special tribunal any more than it will be used as a substitute for statutory methods of review." To construe the Declaratory Judgment Act to permit a federal court to conduct a trial *de novo* in reverse FOIA cases would transfer primary decisional responsibility for agency disclosures from the administrative agencies to the federal courts. We think the construction which Congress intended is that the scope of judicial review provisions of the Administrative Procedure Act apply in declaratory judgment actions.

It seems to us that in reverse FOIA cases under the APA a reviewing court should make the following analysis. First it should inquire whether any non-disclosure statute or non-disclosure regulation is applicable. If so, the court must conclude that the agency has acted outside the scope of its statutory authority, and should enjoin disclosure. If no non-disclosure statute or regulation applies, the court must then determine under what authority the agency intends to disclose the contested information. If the agency has concluded that the contested information does not fall within any FOIA exemption, thus mandating disclosure, the court must examine whether the agency applied the proper legal standards for the applicability of the FOIA exemptions. If, however, the agency has concluded (a) that the contested information does fall within a FOIA exemption but (b) public disclosure is, nevertheless, both desirable and permissible under the agency's own disclosure regulations, the court must undertake a two-step analysis. It must first examine whether the agency applied the proper legal standards for the applicability of the FOIA exemptions and, if so, then examine whether the agency considered the proper factors in determining that disclosure was permitted under its own disclosure regulations. Under the OFCC disclosure regulations, for ex-

ample, the contested information in this case could only be disclosed if that agency determined that disclosure would "further the public interest and [not] impede the discharge of any of the functions of the OFCC or the Compliance Agencies."[95] And, as the FOIA exemptions make clear, disclosure of certain types of information will not, in the opinion of Congress, always be in the public interest. Finally, if the agency record does not establish, or insufficiently explains, the basis for the agency's decision, so as not to permit the reviewing court to effectively perform the above analysis, the remedy is not a trial *de novo*, but a remand to the agency for an additional record or explanation for its decision.[96] Interim relief can, of course, be ordered on the authority of 5 U.S.C. § 705.

Applying the foregoing principles to this case, we conclude that this is an instance in which a remand to the agency is appropriate. The agency record is so ambiguous that it is impossible to determine whether the decision of DSA to disclose the contested information was based on a determination that disclosure is mandated by the FOIA, or is in the public interest and thus permissible under that agency's own disclosure regulations. Even if the agency record clearly revealed that the disclosure decision was based on a determination that disclosure was mandated by the FOIA, a remand would still be necessary, as the record does not sufficiently disclose the basis for the agency determination that the FOIA exemptions are inapplicable. Nor would the result be any different if the record revealed

---

[95] 41 C.F.R. § 60-40.3(a), see n.19 *supra* for text; *id.* at § 60-40.2(a).

[96] *See* Camp v. Pitts, 411 U.S. 138, 142-43 (1973). We recognize that under Camp v. Pitts, *supra*, testimony or affidavits from the administrator setting forth the reasons for the decision made on agency record may sometimes be appropriate. No such testimony or affidavits were tendered in this case. Here we think a remand to the agency is appropriate for the reasons set forth in the text.

that disclosure was pursuant to the agency's own regulations, as the record does not state that, or why, such disclosure would be in the public interest.

Our decision to remand this case is based solely on the inadequacy of the administrative record under review. The government has urged that the district court should not have, and we should not now, reach the merits of the challenge to the actions of DSA because of Chrysler's failure to exhaust an administrative review remedy available in OFCC. We reject this contention. Judicial review of agency action must be available at a meaningful time considering the nature of the alleged injury to the petitioner for review. As DSA announced in its letters, it considers the FOIA 10 day time limit for action on requests for non-exempt FOIA information, 5 U.S.C. § 552(a)(6)(A)(i), binding on it regardless of the pendency of an administrative review proceeding. Since disclosure would render moot any judicial review, the nature of the subject matter demands that the action of DSA be regarded as the final agency action to which such review is directed. The administrative appeal to which the government refers is a creature of regulation, 41 C.F.R. § 60-60.4(d),[97] and the availability of that remedy cannot be permitted to destroy the subject matter of a proceeding seeking judicial review. If there were no pending FOIA requests, and Chrysler were seeking an advance determination that some of the contested information should be withheld from the public it would be appropriate to require exhaustion of a § 60-60.4(d) review in OFCC. But this case is not in that posture. The district court properly considered both the requests for interim relief and the merits of the claim for judicial review.

---

[97] See n.27 *supra*.

D. *Chrysler's Due Process Claims*

Chrysler contends that it was denied due process of law in the agency proceedings which led to the DSA decision to disclose the contested documents. To the extent that Chrysler's due process claims are procedural we hold that, in light of the interests involved, OFCC disclosure regulation 41 C.F.R. § 60-60.4(d),[98] coupled with the process of administrative and judicial review set out above in Part IVC, meet fifth amendment due process standards. Any claim to substantive due process protection of "property" interests in information in the hands of the government is at this stage and on this record too speculative for our consideration. Since the Supreme Court's decisions in *Goldstein* v. *California*, 412 U.S. 546 (1973) and *Kewanee Oil Co.* v. *Bicron Corp.*, 416 U.S. 470 (1974), there is considerable doubt as to what law, state or federal, and if state law, what state's law, should be looked to for such a "property" interest. The government urges that whether or not there is some proprietary interest in the disputed information, that interest is waived by any contractor doing business with the government. There is no need for us to endorse that position, which would require far more knowledge about government contracting statutes than has been furnished to us by the parties in this case. We do note that Chrysler has suggested no proprietary interest which would be broader than the categories made exempt from disclosure by 41 C.F.R. § 60-40.3(a).[99] Until we are faced with a final decision to release such information we need not consider any substantive due process contentions.

---

[98] *Id.*

[99] See n.19 *supra*.

V

Conclusion

The judgment of the district court shall be vacated and the case remanded to the district court for entry of an order that DSA conduct further proceedings consistent with this opinion. The district court should retain jurisdiction pending such further proceedings, and may consider the entry of an appropriate protective order until their completion. Pending the entry of the district court's order pursuant to the mandate of this court the extant stay order shall continue in effect. The appellant and appellees shall each bear their own costs.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

No. 75-159

Chrysler Corporation, *Plaintiff*,

v.

James R. Schlesinger, et al., *Defendants*.

Opinion

Layton, Senior District Judge.

Plaintiff, Chrysler Corporation, is engaged, *inter alia*, in the manufacturing of automobiles, air conditioning and heating equipment and chemical and metal products. Plaintiff transacts business throughout the United States. A portion of Plaintiff's business is comprised of contracts and subcontracts with the United States and its agencies.

Executive Order 11246, as amended 3 C.F.R. E.O. 11246, requires that government contractors refrain from discriminatory employment practices. Section 202 of the Executive Order requires that all large government contracts contain seven specific paragraphs set forth in that section. Plaintiff's contract with the Government contains the required language.

The fourth of the numbered paragraphs set forth in section 202 requires that the contractor comply with all provisions of Executive Order 11246 and of the rules, regulations and relevant orders of the Secretary of Labor. The Secretary of Labor has promulgated regulations pursuant to section 201 of the Executive Order which are found at 41 C.F.R. § 60-1.1 *et seq.*

Executive Order 11246, as amended, and the regulations promulgated thereunder require government contractors to submit equal opportunity reports and programs to the Of-

fice of Federal Contract Compliance ("OFCC") or the Department of Labor and various OFCC compliance agencies, including the Defense Supply Agency ("DSA"). 3 C.F.R. E.O. 11246, § 203; 41 C.F.R. §§ 60-1.2 and 60-1.6. Failure of a government contractor to comply with the Executive Order and the regulations can result in the cancellation of existing contracts and debarment of the contractor from future contract awards. 3 C.F.R. E.O. 11246, § 209.

The DSA has acted as the compliance agency for Plaintiff. Pursuant to the Executive Order and the regulations, which have been incorporated into Plaintiff's contract with the Government, Plaintiff has been required to file the Standard Form 100 ("EEO-1") with the Joint Reporting Committee ("JRC") which collects the form for the DSA. A separate form must be filed for each of Plaintiff's domestic facilities and a separate one for Plaintiff's entire corporate domestic operation. 41 C.F.R. § 60-1.7; Stip. par. 3.

The EEO-1's prepared and filed by Plaintiff contain statistical information with respect to the total number of persons employed, and the number of minority and female persons employed, by Plaintiff in nine general job categories. Stip. par. 3.

Plaintiff has also been required, pursuant to the regulations incorporated into its contract with the Government, to prepare Affirmative Action Plans ("AAP's") for its entire corporate domestic operation and separately for each of its individual domestic facilities. 41 C.F.R. § 60-1.40; Stip. par. 4. In its AAP's, Plaintiff is required to include a great deal of detailed employment information, both statistical and narrative in nature, concerning Plaintiff's total, and minority and female, employment for each of Plaintiff's specific, internally used job classifications. 41 C.F.R. § 60-1.40(a); Stip. par. 4. In this respect each of Plaintiff's AAP's includes information on staffing patterns, pay scales, actual and expected shifts in employment, promotions, seniority and related job matters. Plaintiff's AAP's are also required

to include forecasts of future employment; to set out goals, time tables and future projections for the employment, promotion and utilization of minorities and females; and to include an analysis of Plaintiff's success in meeting such goals. 41 C.F.R. § 60-1.40(b); Stip. par. 5..

Plaintiff is not required regularly to file its AAP's with the DSA, but the DSA regularly conducts "compliance reviews," pursuant to 41 C..F.R. §§ 60-1.20 and 60-60.3, to determine whether Plaintiff is in compliance with the Executive Order and the regulations promulgated thereunder. During the course of such compliance reviews, which consists of an examination of Plaintiff's affirmative action documents and also an on-site examination of Plaintiff's facilities, Plaintiff is required, pursuant to the regulations incorporated into its contract with the Government, to submit pertinent AAP's for its domestic facilities. 41 C.F.R. §§ 60-1.40(c) and 60-60.3(a); Stip. par. 5.

At the conclusion of a compliance review of one of Plaintiff's facilities, the Government's compliance review officer prepares a compliance review report ("CRR"). 41 C.F.R. § 60-60.3. The report includes information submitted to him by Plaintiff, analyzes Plaintiff's compliance with the Executive Order and the regulations, and contains recommendations to the regional office of the DSA on action which should be taken against Plaintiff and the corrective measures which Plaintiff should be required to implement. 41 C.F.R. §§ 60-1.7 and 60-60.3; Stip. par. 5.

The DSA also administers regulations, applicable to Plaintiff pursuant to the contractual agreement, which provide for the filing of complaints alleging violations of Executive Order 11246 and for the investigation and resolution of such complaints. 41 C.F.R. § 60-1.24. These complaints may be filed by job applicants and employees of a government contractor. 41 C.F.R. § 60-1.21.

In investigating a complaint, the DSA generally requests copies of, and reviews, the Plaintiff's AAP's, EEO-1's and related supporting material. Stip. par. 6. DSA is required to file a complaint investigation report ("CIR") with OFCC within sixty days of receipt of the complaint. 41 C.F.R. § 60-1.24(d).

On May 14, 1975, DSA notified Plaintiff by telephone that DSA had received a request for the public disclosure of the 1974 AAP and the report of an October, 1974, complaint investigation for Plaintiff's Newark, Delaware, assembly plant. Stip. par. 9.

By letter dated May 23, 1975, Plaintiff objected to the proposed disclosure of the AAP and the CIR for the Newark, Delaware, plant. Stip. par. 10.

On May 30, 1975, DSA notified Plaintiff by telephone that DSA would disclose the documents on June 4, 1975. Stip. par. 11.

On July 1, 1975, DSA notified Plaintiff by telephone that it had received a request for the public disclosure of the AAP's and CRR's for the Plaintiff's Hamtramck, Michigan, facility. Stip. par. 12.[1]

By letters dated July 3, 1975, and July 11, 1975, Plaintiff objected to the proposed disclosure of the documents relating to its Hamtramck, Michigan, facility. Stip. par. 13.

By letter dated July 18, 1975, DSA notified the Plaintiff that DSA would disclose the documents on July 25, 1975. Stip. par. 14.

---

[1] In its Second Amended Verified Complaint, Plaintiff alleged that the Government intends to disclose an EEO-1 submitted by Plaintiff. The administrative records of the Government's decisions to disclose do not indicate this. Nor did Plaintiff show the Court that an EEO-1 had been attached to any of the documents that the Government intends to disclose. This being so, the Court finds that the Plaintiff has failed to prove that the Government intends to disclose an EEO-1.

In response to the threatened disclosures, Plaintiff has filed a complaint in this Court seeking declaratory and injunctive relief. This Court issued a preliminary injunction against the threatened disclosures.

Jurisdiction

A factual hearing was held over the Government's objection that the Court lacked subject matter jurisdiction of the case. The Court reserved its decision on this issue until a decision on the merits could be rendered.

The complaint contains three numbered counts: 1) that 41 C.F.R. § 60-40.1 *et seq.*, 29 C.F.R. § 70.1 *et seq.*, and 5 U.S.C. § 552 violate Plaintiff's right to due process of law because they do not require predisclosure notice and hearing;[2] 2) that the threatened disclosure is an unlawful abuse of agency discretion and that the Secretary of Labor has exceeded his authority in issuing the regulations upon which the disclosure is based because the threatened disclosures and regulations are in conflict with 42 U.S.C. § 2000e-8(e), 44 U.S.C. § 3508 and 18 U.S.C. § 1905;[3] 3) that the threatened disclosure is an unlawful abuse of agency discretion as the disclosure violates 41 C.F.R. § 60-40.3 and 29 C.F.R. §§ 70.21, 70.22, 70.24 and 70.31.[4]

The Court holds that it has jurisdiction of the case under 28 U.S.C. § 1331 and that the case arises in part under the Fifth Amendment to the United States Constitution.[5] *Bell*

---

[2] Plaintiff's Count III, Second Amended Verified Complaint.

[3] Plaintiff's Count I, Second Amended Verified Complaint.

[4] Plaintiff's Count II, Second Amended Verified Complaint.

[5] ". . . And a cause of action may be supported by two or more grounds, and if one ground involves a substantial federal question that is sufficient to give the federal court jurisdiction to decide the merits of the entire cause of action, even though the federal claim is not sustained, ..." 1 Moore's Federal Practice, ¶ 0.60 [8.-3], P. 634.

v. Hood, 327 U.S. 678, 680-83, 66 S.Ct. 773, 774-775, 90 L.Ed. 939, 942-43 (1946). Having so decided, the Court further holds that the Court may conduct a review, under 5 U.S.C. § 701 *et seq.*, of the agency's decision to disclose. While 5 U.S.C. § 702 is not considered a jurisdiction-granting statute in the Third Circuit, the Court has jurisdiction of the case under 28 U.S.C. § 1331, which provides the independent basis of jurisdiction required by *Bachowski v. Brennan*, 502 F.2d 79, 82 (3rd Cir. 1974), rev'd on other grounds, 421 U.S. 560, 95 S.Ct. 1851, 44 L.Ed.2d 377 (1975).

Public Disclosure of Information By An Agency

The Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, divides the information within the Government's control into two kinds: 1) information which must be disclosed upon request and 2) information which may or must be withheld from a requestor. *Charles River Park "A", Inc. v. HUD*, 171 U.S.App.D.C. 286, 519 F.2d 935, 942 (1975).

The FOIA requires the Plaintiff in this "reverse" Freedom of Information case to prove that the information requested is not in the category of information which must be disclosed upon request. To do this, Plaintiff must prove that the information sought by the requestor is within one of the nine categories of information excepted from mandatory disclosure in 5 U.S.C. § 552(b).* *Sears, Roebuck & Co. v. GSA*, 402 F.Supp. 378, 383 (D.D.C.1975).

---

*5 U.S.C. § 552(b):

"This section does not apply to matters that are—

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and

(B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of any agency;

The Plaintiff has failed to prove that any category other than 5 U.S.C. § 552(b)(4) is applicable to any of the requested information. Further, Plaintiff has failed to prove that 5 U.S.C. § 552(b)(4) is applicable to any information other than the manning tables contained in the AAP's and CRR's.

---

(3) specifically exempt from disclosure by statute;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

Any reasonably segregated portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this section."

At the evidentiary hearing, Plaintiff placed a copy of an AAP (Px-1) and a CRR (Px-4) in evidence and called four principal witnesses: Mr. Harris, Plaintiff's "Manager of personnel administration at the corporate level"; Mr. Dussey, Plaintiff's "manager of personnel research"; Mr. Kerr, Plaintiff's "assistant corporate controller"; and Dr. Plotkin, a "senior economist" employed by Arthur D. Little, Inc., an accounting firm.

Most of the evidence presented by the Plaintiff related to an AAP for the Newark, Delaware, facility (Px-1). Harris testified that the the AAP contains "manning" tables for each subdepartment of the facility. (Tr. 31). The manning table are lists of the Plaintiff's internally used job titles and the number of people who perform each job. (Tr. 29). The number of people who perform the job is known as the "population," and the population is broken down by sex and race. (Tr. 29).

Similar manning tables can be found in the CRR, Px-4. Thus, much of the evidence introduced to explain the importance of the AAP to Plaintiff applies with equal force to the CRR.

Plaintiff has contended, and proved to the satisfaction of the Court, that the manning tables contained in the AAP and CRR are confidential commercial information within the meaning of 5 U.S.C. § 552(b)(4). In order to be so, the information must be: 1) confidential and 2) such that release could cause Plaintiff substantial competitive harm. *National Park & Conservation Assn. v. Morton,* 162 U.S. App.D.C. 223, 498 F.2d 765, 770 (1974).

The testimony clearly shows that the manning tables are confidential. Harris and Dussey testified that the AAP's prepared by Plaintiff have not been released to anyone. (Tr. 57, 74-75). Dussey testified that manning tables have never been disclosed and that a job classification's population has never been disclosed. (Tr. 103). Plotkin testified that personnel data similar to the manning tables is not available elsewhere (Tr. 227), and the Government failed to show the contrary.

The record also establishes that the release of the manning tables could cause Plaintiff substantial competitive harm in several different ways. First, the possession of such a document could aid another corporation in its practice of employee raiding, a practice not unknown in the automobile industry. (Tr. 41). The manning tables, with their race and sex breakdown, would aid a potential employer in identifying a Chrysler employee with just the skills, race and sex it needs. (Tr. 45-47). Employee raiding is particularly helpful in meeting minority and female hiring goals and requirements. (Tr. 42-43). Losses of such employees are expensive to the Plaintiff because they distract employees from their jobs and the loss of an employee means the loss of the funds spent training him. (Tr. 43-44).

Second, the possession of a manning table would permit a competitor to determine the exact use of Plaintiff's labor force, and thus the technology being applied by Plaintiff. Plotkin demonstrated this by diagraming Plaintiff's Newark, Delaware, facility based solely upon the information contained in the manning tables. His diagram was introduced into evidence as Px-9. Such a diagram would be useful in comparative analysis and would alert competitors to areas worth their managerial time. (Tr. 162-63; Tr. II 27).

Third, the possession of manning tables produced over several years would allow Plaintiff's competitors to reduce their risk taking. (Tr. II 54-55). All automobile manufacturers purchase machinery from the same producers. (Tr. II 52-55). Allowing Plaintiff to buy newly designed equipment and waiting to see the changes in employee utilization reflected in the different years' manning tables would allow the competitor to determine whether the machinery decreases or increases labor costs. (Tr. II 55-56). After reading Plaintiff's test results from the manning tables, the

competitor would know whether or not the new equipment was a good investment.

Having found that the manning tables contained in the AAP's and CRR's are exempt from mandatory disclosure,[7] they are found to be of the second type of information created by the FOIA, information which may or must be withheld. Information of this type is not controlled by the FOIA, but by regulations promulgated under 5 U.S.C. § 301.[8] *Charles River Park "A", Inc.*, 519 F.2d at 942.

5 U.S.C. § 301 is the general statute providing for the promulgation of regulations for the use and custody of government records. Pursuant to this statute, the Secretary of Labor promulgated 29 C.F.R. § 70.21(a)[9] which is applicable

---

[7] Data similar to that found in EEO-1's can be found in the AAP's. This data is far less detailed than that found in the manning tables. The data is broken down into only nine general job categories. Plaintiff failed to meet its burden of proof to show that the release of such general data could cause substantial competitive harm. Therefore, this data is not within the 5 U.S.C. § 552b)(4) exemption to the general rule of mandatory disclosure.

[8] 5 U.S.C. § 301:

"The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public."

[9] 29 C.F.R. § 70.21(a):

"Pursuant to the provisions of 18 U.S.C. 1905, every officer and employee of the Department of Labor is prohibited from publishing, divulging, disclosing, or making known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with the Department or any agency or officer or employee thereof, which information concerns or relates

to DSA as a delegate of powers of the Department of Labor's OFCC. (*See*, 41 C.F.R. § 60-1.6).

29 C.F.R. § 70.21(a) forbids the agency to disclose information that would expose the disclosing employee to criminal liability under 18 U.S.C. § 1905.[10] That criminal statute makes it illegal for a government employee to disclose confidential statistical data submitted to the Government by a corporation.

The manning table contained in the AAP's and CRR's consist entirely of confidential commercial statistical data. All of the statistics were submitted by Plaintiff, a corporation. Therefore, an employee disclosing the manning tables contained in the AAP's and CRR's would face criminal liability under 18 U.S.C. § 1905. Such a disclosure is forbidden by 29 C.F.R. § 70.21(a).

The DSA's decision to disclose the manning tables violates 29 C.F.R. § 70.21(a). An agency which violates its

---

to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association. No officer or employee of the Department of Labor shall disclose records in violation of this provision of law."

[10] 18 U.S.C. § 1905:

"Whoever, being an officer or employee of the United States or of any department or agency thereof, publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined not more than $1,000, or imprisoned not more than one year, or both; and shall be removed from office or employment."

regulations is acting contrary to law, within the meaning of 5 U.S.C. § 706(2)(A),[11] and may be enjoined from so doing. *See, S.S. Logging Co., Inc. v. Barker,* 366 F.2d 617, 624 n. 6 (9th Cir. 1966); *Delaware v. Bender,* 370 F. Supp. 1193, 1203 (D.Del.1974). Therefore, the Court will enjoin the disclosure of the manning tables found in the AAP's and CRR's.

In light of the foregoing, it is not necessary to discuss the other regulations cited by Plaintiff in Count II of its complaint.

Nor is it necessary to discuss the alleged conflict between the Government's disclosure regulations and the statutes cited by Plaintiff in Count I of its complaint. From what has

[11] 5 U.S.C. § 706:

"To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error."

been said above, it is clear that the regulations do not conflict with 18 U.S.C. § 1905. That section is fully incorporated into the Government's disclosure regulation 29 C.F.R. § 70.21(a). The other criminal statute cited by Plaintiff, 42 U.S.C. § 2000e-8(e) does not apply to this fact pattern for the reasons stated in *Sears, Roebuck & Co. v. GSA,* 166 U.S.App.D.C. 194, 509 F.2d 527 (1974).

Plaintiff's final claim is that the FOIA and the Government's disclosure regulations violate the Fifth Amendment to the United States Constitution because they do not require that Plaintiff be given notice of an FOIA request for disclosure of information submitted to the Government by Plaintiff and they do not require that Plaintiff be given a hearing prior to disclosure in response to such a request.

The Fifth Amendment requires that the Government grant notice and a hearing to a corporation before it deprives it of property. *Perry v. Sinderman,* 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972); *Security Trust Co.* v. *Lexington,* 203 U.S. 323, 27 S.Ct. 87, 51 L.Ed. 204 (1906). 41 C.F.R. § 60-60.4(d) [12] provides for a hearing prior to the

[12] 41 C.F.R. § 60-60.4(d):

"*Public access to information.* Information obtained from a contractor under Subpart B will be subject to the public inspection and copying provisions of the Freedom of Information Act, 5 U.S.C. 552. Contractors should identify any information which they believe is not subject to disclosure under 5 U.S.C. 552 and should specify the reasons why such information is not disclosable. The Contract Compliance Office will consider the contractors claim and make a determination, within 10 days, as to whether the material in question is exempt from disclosure. The contract compliance officer will inform the contractor of such a determination. The contractor may appeal that ruling to the Director of OFCC within 10 days. The Director of OFCC shall make a final determination within 10 days of the filing of the appeal. However, during the conduct of a compliance review or while enforcement action against the contractor is in progress or contemplated within a reasonable time, all information obtained from a contractor under Subpart B except information disclosable under §§ 60-40.2 and 60-40.3 of this

public disclosure of information submitted by the Plaintiff. This regulation provides that the AAP's and the data which Plaintiff supplies for the CRR's may be claimed by the Plaintiff to be non-disclosable at the time they are submitted to DSA.[13] The regulation provides Plaintiff with the opportunity to specify why it believes the information to be non-disclosable and provides for a determination of Plaintiff's claims within ten days. It also allows Plaintiff ten days in which to appeal to the Director of OFCC and requires the Director to decide the appeal in ten days. The decision of the Director is a final agency decision reviewable under 5 U.S.C. § 701 *et seq.* Thus, the regulations grant Plaintiff a constitutionally adequate hearing.

The record shows that Plaintiff was in fact given a pre-disclosure hearing. Pursuant to 32 C.F.R. § 1285.7(b)(7),[14] Plaintiff was notified that an FOIA request to disclose information which Plaintiff had submitted had been received by the DSA. Plaintiff was given an opportunity to submit written objections to, and written arguments against, the public disclosure of the requested information. DSA decided to disclose the manning table, among other documents, and it is this decision which the Court has reviewed and found contrary to the agency's regulations.

---

chapter is to be considered part of an investigatory file compiled for law enforcement purposes within the meaning of 5 U.S.C. 522 (b)(7), and such information obtained from a contractor under Subpart B shall be treated as exempt from mandatory disclosure under the Freedom of Information Act during the compliance review."

[13] Plaintiff has argued that 41 C.F.R. § 60-60.4(d) does not provide for a claim of non-disclosability at the time of submission of information to the Government, but rather at the time an FOIA disclosure request is received. Such a reading of the regulation's language is possible. However, when 41 C.F.R. § 60-60.4(d) is read with the rest of the subpart, it becomes clear that the regulation is speaking of the time of submission of information. Further, Plaintiff's reading of 41 C.F.R. § 60-60.4(d) would place it in conflict with the time limitations found in 5 U.S.C. § 552(a)(6)(A).

In conclusion, the Court, having found that the disclosure of the manning tables contained in the AAP's and the CRR's is contrary to 29 C.F.R. § 70.21(a) and that the agency decision to disclose the manning tables is contrary to law, the Court will enter a permanent injunction against the disclosure of the manning tables.

What has been said herein shall constitute findings of fact and conclusions of law.

Parties will submit proposed orders in the light of this opinion.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 76-1970 and 76-2238

CHRYSLER CORPORATION, Appellant in No. 76-1970

vs.

JAMES A. SCHLESINGER, Secretary United States Department of Defense; LT. GEN. WALLACE ROBINSON, Director, Defense Supply Agency; PHILIP J. DAVIS, Director, Office of Federal Contract Compliance; and JOHN DUNLOP, Secretary United States Department of Labor, Appellants in No. 76-2238

(D.C. Civil No. 75-159)

ON APPEAL FROM THE UNITED DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Present: VAN DUSEN, ADAMS and GIBBONS, *Circuit Judges*

Judgment

This cause came on to be heard on the record from the United States District Court for the District of Delaware and was argued by counsel on June 13, 1977.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court filed June 17, 1976, be, and the same is hereby vacated and the cause remanded to the district court for entry of an order that the Defense Supply Agency conduct further proceedings consistent with the opinion of this Court. The district court should retain jurisdiction pending such further proceedings, and may consider the entry of an appropriate protective order until their completion. Pending the entry of the district court's order pursuant to

the mandate of this Court the extant stay orders, dated June 17, 1976 and July 1, 1976, shall continue in effect. Appellant and appellees shall each bear their own costs.

ATTEST:
THOMAS QUINN
Clerk

September 26, 1977

APPENDIX D

Statutes and Regulations

The Freedom of Information Act, 5 U.S.C. 552, as amended by Pub. L. 93-502, 88 Stat. 1562, and Pub. L. 94-409, 90 Stat. 1247, provides in pertinent part:

§ 552. Public information; agency rules, opinions, orders, records, and proceedings.

(a) Each agency shall make available to the public information as follows:

* * * * *

(3) * * * each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(4) * * *

* * * * *

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

* * * * *

(b) This section does not apply to matters that are—

* * * * *

(3) specifically exempted from disclosure by statute

(other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withfield * * *;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

* * * * *

18 U.S.C. 1905 provides:

Whoever, being an officer or employee of the United States or of any department or agency thereof, publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined not more than $1,000, or imprisoned not more than one year, or both; and shall be removed from office or employment.

The OFCCP disclosure regulations, 41 C.F.R. Part 60-40, provide in pertinent part:

5 U.S.C. § 301 provides:

The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution

and performance of its business, and the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public.

§ 60-40.1 Purpose and scope.

This part contains the general rules of the OFCC providing for public access to information from records of the OFCC or its various compliance agencies. These regulations implement 5 U.S.C. 552, the Freedom of Information Act and supplement the policy and regulations of the Department of Labor, 29 CFR Part 70. It is the policy of the OFCC to disclose information to the public and to cooperate with other public agencies as well as private parties seeking to eliminate discrimination in employment. This part sets forth generally the categories of records accessible to the public, the types of records subject to prohibitions or restrictions on disclosure, and the places at which and the procedures whereby members of the public may obtain access to and inspect and copy information from records in the custody of the OFCC and the compliance agencies.

§ 60-40.2 Information available on request.

(a) Upon the request of any person for identifiable records obtained or generated pursuant to Executive Order 11246 (as amended) such records shall be made available for inspection and copying, notwithstanding the applicability of the exemption from mandatory disclosure set forth in 5 U.S.C. 552 subsection (b), if it is determined that the requested inspection or copying furthers the public interest and does not impede any of the functions of the OFCC or the Compliance Agencies except in the case of records disclosure of which is prohibited by law.

(b) Consistent with the above, all contract compliance documents within the custody of the OFCC and the Compliance Agencies shall be disclosed upon request unless specifically prohibited by law or as limited elsewhere herein. The types of documents which if in the custody of the OFCC or Compliance Agencies must be disclosed include, but are not limited to, the following:

(1) Affirmative action plans, whether or not reviewed and finally accepted by the OFCC or the Compliance Agencies except as limited in 41 CFR 60-40.3(a)(1).

(2) Imposed plans and hometown plans, pending or approved.

(3) Text of final conciliation agreements.

(4) Validation studies of tests or other preemployment selection methods.

(5) Dates and times of scheduled compliance reviews.

§ 60-40.3 Information exempt from compulsory disclosure and which may be withheld.

(a) The following documents or parts thereof are exempt from mandatory disclosure by the OFCC and the compliance agencies, and should be withheld if it is determined that the requested inspection or copying does not further the public interest and might impede the discharge of any of the functions of the OFCC or the Compliance Agencies.

(1) Those portions of affirmative action plans such as goals and timetables which would be confidential commercial or financial information because they indicate, and only to the extent that they indicate, that a contractor plans major shifts or changes in his personnel requirements and he has not made this information available to the public. A determination by an agency to withhold this type of information should be made only after receiving verification and a satisfactory explanation from the contractor that the information should be withheld.

(2) Those portions of affirmative action plans which constitute information on staffing patterns and pay scales but only to the extent that their release would injure the business or financial position of the contractor, would constitute a release of confidential financial information of an employee or would constitute an unwarranted invasion of the privacy of an employee.

(3) The names of individual complainants.

(4) The assignments to particular contractors of named compliance officers if such disclosure would subject the named compliance officers to undue harrassment or would affect the efficient enforcement of the Executive order.

(5) Compliance investigation files including the standard compliance review report and related documents, during the course of the review to which they pertain or while enforcement action against the contractor is in progress or contemplated within a reasonable time. Therefore, these reports and related files shall not be disclosed only to the extent that information contained therein constitutes trade secrets and confidential commercial or financial information, inter-agency or intra-agency memoranda or letters which would not be available by law to a private party in litigation with the agency, personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, data which would be exempt from mandatory disclosure pursuant to the "informants privilege" or such information the disclosure of which is prohibited by statute.

(6) Copies of preemployment selection tests used by contractors.

(b) Other records may be withheld consistent with the Freedom of Information Act on a case-by-case basis, with the prior approval of the Director, OFCC.

§ 60-40.4 Information disclosure of which is prohibited by law.

The Standard Form 100 (EEO-1) which is submitted by contractors to the OFCC, a compliance agency or a Joint Reporting Committee servicing both the OFCC and the EEOC shall be disclosed pending further instructions from the Director, OFCC. The statutory prohibition on disclosure set forth in Section 709 (e) of the Civil Rights Act of 1964 is limited by the terms of that section to information obtained pursuant to the authority of title VII of that Act and its disclosure by employees of the EEOC.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action No. 75-159

CHRYSLER CORPORATION, *Plaintiff*,

v.

JAMES R. SCHLESINGER, ET AL. *Defendants*.

Memorandum

On April 20, 1976, the Court filed an opinion in this case and requested that the parties submit proposed orders. The orders have been filed and the Court has heard the parties' arguments in support of their proposals.

Despite the clarity of this Court's opinion defining "manning tables", Chrysler's counsel presented a proposed order designed to withhold from release to the public a substantial amount of material which obviously does not conform to the Court's definition of "manning tables." Plaintiff's arguments for the inclusion of this extra material was that it fell within Dr. Plotkin's definition of "manning tables" (Tr. 210-11). In other words, Chrysler is attempting to reargue the case under the guise of a definition of "manning tables" stated by a single witness. The Court is well aware of Dr. Plotkin's testimony and, in fact, adopted most of it. But it should be remembered that both Messrs. Harris and Dussey, Plaintiff's first two witnesses, defined "manning tables" (Tr. 26-31 and Tr. 73) in the narrow sense adopted by the Court. And also Mr. Kirk, Plaintiff's third witness, while he did not specifically define "manning tables", nevertheless, when asked to point out examples of material, the release of which would be harmful to Chrysler, cited information that could only come from "manning tables" as defined by Messrs. Harris and Dussey. (Tr. 198-99)

Dr. Plotkin concededly defined "manning tables" more broadly. But significantly in almost every case where asked to demonstrate where Plaintiff would suffer substantial completitive harm he cited from material drawn from the the "manning tables" as defined by the previous witnesses. Tr. II 21-27, 40-45 and 46-48. The Court's definition of "manning tables" at page 9, of its opinion will be adhered to.

In the Court's view, Chrysler will suffer no substantial competitive harm by the release of any of the material sought to be withheld from release except for those pages specifically referred to in the following order.

Order

It is ORDERED, ADJUDGED AND DECREED, this 17th day of June, 1976,

That the Defendants, their agents and employees are permanently enjoining and restrained from releasing or disclosing to the public by any means whatsoever the contents of the following documents as contained on the specific pages enumerated:

1. Affirmative Action Program, Chrysler Corporation, Newark Assembly Plant, Program Year 9-1-74 to 9-1-75, pages: 48, 51, 52, 56, 57, 58, 63, 64, 65, 66, 67, 68, 72, 73, 74, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 104, 105, 106, 107, and 112.

2. Affirmative Action Program, Hamtramck Assembly Plant, July 1, 1973 to January 1, 1975 with information updated to May 1, 1975, pages: 121 through 149, inclusive.

CALEB LAYTON

U.S.D.J.

Supreme Court, U. S.
FILED
FEB 22 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-922

CHRYSLER CORPORATION, *Petitioner,*

v.

HAROLD BROWN, et al., *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONER

BURT A. BRAVERMAN
DANIEL STARK
COLE, ZYLSTRA & RAYWID
2011 Eye Street, N.W.
Washington, D.C. 20006

A. WILLIAM ROLF
P.O. Box 1919
Detroit, Michigan 48288

Attorneys for Petitioner Chrysler Corporation

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-922

CHRYSLER CORPORATION, *Petitioner,*

v.

HAROLD BROWN, et al., *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONER

Pursuant to Rule 24.5 of the Rules of the Supreme Court, Petitioner Chrysler Corporation files this Supplemental Brief to bring to the Court's attention the recent decision of the Eighth Circuit in *General Dynamics Corporation* v. *Marshall, et al,* No. 77-1192 (8th Cir. February 14, 1978). A copy of the court's opinion is attached to this brief.

The decision of the Eighth Circuit conflicts with the Fourth Circuit's decision in *Westinghouse Electric Corp.* v. *Schlesinger,* 542 F.2d 1190 (4th Cir. 1976), *cert. den. sub nom Brown* v. *Westinghouse Electric Corp.,* 431 U.S. 924 (1977) in each of the ways as does the Third Circuit decision in the present case of *Chrysler Corporation* v. *Brown.* This added conflict

among the Circuits serves to illustrate the increased need for Supreme Court resolution of the issues presented by Chrysler Corporation's petition.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

BURT A. BRAVERMAN
DANIEL STARK
COLE, ZYLSTRA & RAYWID
2011 Eye Street, N.W.
Washington, D.C. 20006

A. WILLIAM ROLF
P.O. Box 1919
Detroit, Michigan 48288

Attorneys for Petitioner
Chrysler Corporation

ATTACHMENT

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 77-1192

GENERAL DYNAMICS CORPORATION, *Appellee,*

v.

RAY MARSHALL, Secretary, United States Department of Labor; ROGERS C.B. MORTON, Secretary, United States Department of Commerce; PHILIP J. DAVIS, Director, Office of Federal Contract Compliance Programs, United States Department of Labor; ROBERT J. BLACKWELL, Assistant Secretary for Maritime Affairs, United States Department of Commerce; JOHN M. HENEGHAN, Director, Office of Civil Rights, Maritime Administration, United States Department of Commerce; WILLIAM P. CLEMENTS, Deputy Secretary, United States Department of Defense; FREDERICK A. SCHREIBER, Director, Contracts Compliance, Defense Contract Administration Services Region, Los Angeles, California, Defense Supply Agency, United States Department of Defense; LT. GEN. WALLACE H. ROBINSON, JR., Director, Defense Supply Agency, United States Department of Defense; and JAMES W. CISCO, Administration Chief, Contracts Administration Services, Defense Contract Administration Services, Defense Supply Agency, United States Department of Defense,

Appellants.

Appeal from the United States District Court for the Eastern District of Missouri

---

Submitted: November 15, 1977
Filed: February 14, 1978

Before GIBSON, *Chief Judge*, LAY and STEPHENSON, *Circuit Judges.*

LAY, *Circuit Judge.*

General Dynamics Corporation seeks injunctive relief to prevent disclosure of portions of the Affirmative Action Programs (AAP's) of General Dynamics' Electric Boat and Convair Divisions, filed with federal agencies as a condition to the award of government contracts. Third parties had requested the disclosure of the information pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552.

After receiving notice of administrative decisions to disclose much of the requested information, General Dynamics filed suit in the federal district court seeking to permanently enjoin the disclosures. The court recognized that General Dynamics had a valid cause of action arising under FOIA and 18 U.S.C. § 1905. After considering stipulated facts and affidavits filed in support of cross motions for summary judgment, the district court determined that the contested portions of the AAP's were within the scope of 5 U.S.C. § 552(b)(3), which exempts from mandatory disclosure under FOIA information "specifically exempted from disclosure by statute." The basis of the court's determination was its finding that disclosure of the information was prohibited by 18 U.S.C. § 1905. The district court further found that the information in question was within the scope of 5 U.S.C. § 552(b)(4), which exempts confidential commercial and financial information from the provisions of FOIA. The district court granted a permanent injunction prohibiting disclosure of the contested portions of the AAP's of both the Electric Boat and Convair Divisions of General Dynamics, apparently construing the FOIA exemptions as mandatory provisions requiring nondisclosure. *General Dynamics Corp.* v. *Dunlop*, 427 F. Supp. 578 (E.D. Mo. 1976).

We find that the district court erred in construing the statutory exemptions of FOIA to be mandatory and in undertaking de novo review of the administrative determination to disclose the information in question. We reverse and remand for further proceedings.

On June 24, 1975, a request for a copy of the Electric Boat Division's AAP was sent to the Maritime Administration. The Maritime Administration informed General Dynamics of this request and the procedures to be followed in objecting to the proposed disclosure. Electric Boat Division objected to the disclosure of parts of the AAP, asserting that the information was exempt from disclosure under FOIA, 5 U.S.C. § 552(b)(4), and regulations of the Office of Federal Contract Compliance Programs (OFCC), 41 C.F.R. § 60-40.3(a)(1) and (2), as confidential commercial and financial information.[1] The

---

[1] FOIA lists nine specific exemptions from the otherwise mandatory disclosure required by the Act, two of which are relevant to this appeal:

> This section does not apply to matters that are—
>
> . . . .
>
> (3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;
>
> (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential . . . .

5 U.S.C. § 552(b).

The OFCC regulations also exempt certain materials from required disclosure:

> *Information exempt from compulsory disclosure and which may be withheld.*
>
> (a) The following documents or parts thereof are exempt from mandatory disclosure by the OFCC and the compliance

Maritime Administration determined that disclosure of the information was proper despite Electric Boat's objections and this decision was upheld by the OFCC on appeal with certain minor exceptions for information relating to specific employees.

The Convair Division AAP was requested from the Defense Supply Agency (DSA) on June 2, 1975. Convair Division objected to the disclosure of parts of the AAP on the grounds that the information was "confidential and proprietary data" exempt from disclosure under FOIA. The DSA determined that the contested information did not fall within any FOIA exemption and therefore disclosure was mandated under the Act. The decision to disclose much of the information was affirmed on appeal to the OFCC, although that agency's determination was apparently based on OFCC regulations rather than the provisions of FOIA.

---

agencies, and should be withheld if it is determined that the requested inspection or copying does not further the public interest and might impede the discharge of any of the functions of the OFCC or the Compliance Agencies.

(1) Those portions of affirmative action plans such as goals and timetables which would be confidential commercial or financial information because they indicate, and only to the extent that they indicate, that a contractor plans major shifts or changes in his personnel requirements and he has not made this information available to the public. A determination by an agency to withhold this type of information should be made only after receiving verification and a satisfactory explanation from the contractor that the information should be withheld.

(2) Those portions of affirmative action plans which constitute information on staffing patterns and pay scales but only to the extent that their release would injure the business or financial position of the contractor, would constitute a release of confidential financial information of an employee or would constitute an unwarranted invasion of the privacy of an employee. . . .

41 C.F.R. § 60-40.3.

As a government contractor, General Dynamics is required by Executive Order 11246, 30 Fed. Reg. 12319 (1965), as amended by Executive Order 11375, 32 Fed. Reg. 14303 (1967), to take affirmative action to eliminate discriminatory employment practices. Regulations promulgated by the Secretary of Labor require that certain government contractors prepare and make available for administrative inspection AAP's providing information on past and projected employment of women and minorities. 41 C.F.R. §§ 60-1.40, 60-2.1. The regulations delegate administrative responsibility for enforcing the Executive Order to the Director of the Office of Federal Contract Compliance Programs. 41 C.F.R. § 60-1.2. The Director, in turn, has designated certain "compliance agencies" which have primary responsibility for monitoring compliance with the provisions of the Executive Order. 41 C.F.R. §§ 60-1.3, 60-1.6. The Maritime Commission and the DSA are the compliance agencies for the Electric Boat and Convair Divisions, respectively.

The provisions of FOIA are applicable to records submitted to the compliance agencies, and in addition the Secretary of Labor has promulgated regulations setting out guidelines for the disclosure of information received by the OFCC or its compliance agencies from government contractors. *See* 41 C.F.R. § 60-40.1 et seq. These regulations are designed to implement FOIA and reflect the policy of the OFCC to disclose information to the public and cooperate with other agencies and private parties seeking to eliminate discrimination in employment.[3]

---

[3] In addition to the disclosure requirements imposed by FOIA, the OFCC regulations mandate disclosure by the agency, upon specified findings, of a broad class of documents, including some information that would be exempt under FOIA. Specifically, the regulations provide:

(a) Upon the request of any person for identifiable records obtained or generated pursuant to Executive Order 11246 (as amended) such records shall be made available for inspection

The FOIA requires agencies to disclose upon request information not specifically exempt under 5 U.S.C. § 552 (b). *See Department of the Air Force* v. *Rose*, 425 U.S. 352 (1976); *EPA* v. *Mink*, 410 U.S. 73 (1973). The Act expressly creates a cause of action in favor of parties requesting information to enjoin agencies from withholding that information. 5 U.S.C. § 552(a)(4)(B). It is likewise clear that only information which falls within the exemptions listed in FOIA may be withheld by the agency despite a request for disclosure. However, the Act does not create a cause of action for submitters of information within the exemptions listed in § 552(b). In plain terms, FOIA is simply not applicable in reverse cases since the statute unequivocally states that the Act "does not apply" to matters of the type specified in the exemptions. 5 U.S.C. § 552(b).

Despite this clear statutory language, courts have reached conflicting decisions as to the permissive or mandatory nature of the exemptions and the existence of a

---

and copying, notwithstanding the applicability of the exemption from mandatory disclosure set forth in 5 U.S.C. 552 subsection (b), if it is determined that the requested inspection or copying furthers the public interest and does not impede any of the functions of the OFCC or the Compliance Agencies except in the case of records disclosure of which is prohibited by law.

(b) Consistent with the above, all contract compliance documents within the custody of the OFCC and the Compliance Agencies shall be disclosed upon request unless specifically prohibited by law or as limited elsewhere herein. The types of documents which if in the custody of the OFCC or Compliance Agencies must be disclosed include, but are not limited to, the following:

(1) Affirmative action plans, whether or not reviewed and finally accepted by the OFCC or the Compliance Agencies except as limited in 41 CFR 60-40.3(a)(1). . . .

41 C.F.R. § 60-40.2.

cause of action, based on FOIA itself, to enjoin proposed disclosure of information within the exemptions. *See Westinghouse Electric Corp.* v. *Schlesinger*, 542 F.2d 1190 (4th Cir. 1976), *cert. denied*, 431 U.S. 924 (1977) (holding that a cause of action exists to enjoin disclosure of exempt information); *Union Oil Co.* v. *FPC*, 542 F.2d 1036, 1045 (9th Cir. 1976) (language, subsequently withdrawn as premature, to the effect that FOIA exemptions mandate non-disclosure); *Pennzoil Co.* v. *FPC*, 534 F.2d 627, 630 (5th Cir. 1976) (holding that exemptions are permissive); *Charles River Park "A", Inc.* v. *HUD*, 519 F.2d 935, 941 (D.C. Cir. 1975) (holding exemptions permissive).[3]

In the most recent decision, *Chrysler Corp.* v. *Schlesinger*, 565 F.2d 1172 (3d Cir. 1977), *petition for cert. filed sub nom. Chrysler Corp.* v. *Brown*, 46 U.S.L.W. 3438 (U.S. Dec. 27, 1977) (No. 77-922), the Third Circuit reviewed the legislative history of FOIA exemptions. In a well-reasoned opinion by Judge Gibbons the court held that both the Act and its legislative history clearly establish that there exists no statutory mandate of nondisclosure of exempt information nor any cause of action to prevent disclosure of such information.[4] We agree. Any

---

[3] *But see* K. Davis, Administrative Law Treatise § 3A.5, at 122 (Supp. 1970), where the commentator unequivocally states:

> The exemptions protect against required disclosure, not against disclosure. The Act leaves officers free to disclose or withhold records covered by the exemptions, but they may then be governed by other statutory law, by the common law, by executive privilege, by executive orders, or by agency-made law in the form of regulations, orders, or instructions.

[4] The legislative history of the 1974 amendments to FOIA leave little doubt that Congress' intent was that the exemptions be considered permissive:

> Congress did not intend the exemptions in the FOIA to be used either to prohibit disclosure of information or to justify

other construction would controvert "the basic policy that disclosure, not secrecy, is the dominant objective of the Act." *Department of the Air Force* v. *Rose, supra* at 361.

Such a construction is in harmony with the principal statement by the Supreme Court as to the effect of FOIA exemptions:

> Without question, the Act is broadly conceived. It seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands. Subsection (b) is part of this scheme and represents the congressional determination of the types of information that the Executive Branch must have *the option* to keep confidential, *if it so chooses.* As the Senate Committee explained, it was not "an easy task to balance the opposing interests, but it is not an impossible one either. . . . Success lies in providing a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure." S. Rep. No. 813, p. 3. [89th Cong., 1st Sess. (1965)].

EPA v. *Mink, supra* at 80 (emphasis added).

---

automatic withholding of information. Rather, they are only *permissive*. They merely mark the outer limits of information that *may* be withheld where the agency makes a specific affirmative determination that the public interest and the specific circumstances presented dictate—as well as that the intent of the exemption relied on allows—that the information should be withheld. . . .

A number of agencies have by regulation adopted this position that, notwithstanding applicability of an FOIA exemption, records must be disclosed where there is no compelling reason for withholding. . . . This approach was clearly intended by Congress in passing the FOIA.

S. Rep. No. 93-854, 93d Cong., 2d Sess. 6 (1974).

See also Department of the Air Force v. *Rose, supra* at 361-62.

We find the district court erred in construing the exemptions as mandatory provisions requiring nondisclosure and affording a basis for injunctive relief.

The district court alternatively held that 18 U.S.C. § 1905 provided a cause of action to enjoin disclosure of information submitted to government agencies. Section 1905 is a criminal statute providing penalties for disclosure of a broad class of information where disclosure is "not authorized by law."[1] In view of the limited circumstances in which a private cause of action may be implied from a federal criminal statute, *Cort* v. *Ash*, 422 U.S. 66 (1975), we endorse the view expressed in the *Chrysler* case that 18 U.S.C. § 1905 does not afford submitters of information a cause of action for injunctive relief against proposed disclosures by administrative agencies. *See Chrysler Corp.* v. *Schlesinger, supra* at 1188. Furthermore, even assuming the applicability of § 1905, the statute's criminal sanctions for disclosure of

---

[1] Title 18 U.S.C. § 1905 provides as follows:

> Whoever, being an officer or employee of the United States or of any department or agency thereof, publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined not more than $1,000, or imprisoned not more than one year, or both; and shall be removed from office or employment.

information apply only to disclosures "not authorized by law." Here, OFCC regulations specifically provide for the disclosure of AAP's upon a finding that disclosure would be in the public interest and would not impede agency functions. *See* 41 C.F.R. § 60-40.2.[8] We find disclosure pursuant to the OFCC regulations is "authorized by law" and not within the prohibition of 18 U.S.C. § 1905. *See Chrysler Corp.* v. *Schlesinger*, *supra* at 1186-88. *But see Westinghouse Electric Corp.* v. *Schlesinger*, *supra* at 1201-03; *Charles River Park "A", Inc.* v. *HUD*, *supra* at 942-43.[9]

Faced with administrative determinations by the OFCC to disclose information pursuant to the regulations of that agency, General Dynamics did have the right to seek judicial review of the decisions under the Administrative Procedure Act, 5 U.S.C. § 701 et seq. Such action would not, however, entail de novo review by the district court but would instead require a determination on the administrative record of whether the agency's decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). *See Camp* v. *Pitts*, 411 U.S. 138 (1973); *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402 (1971).

---

[8] Promulgation of regulations setting out procedures for handling agency documents is authorized by 5 U.S.C. § 301, which states:

> The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public.

[9] Under our holding, we think it clear that not only does § 1905 fail to provide a private cause of action, but for the reasons stated, contrary to the district court's holding, it does not afford a basis for exemption under § 552(b)(3).

The procedure for review by the district court in reverse FOIA cases under the APA is made clear in the *Chrysler* case. First, the court must determine whether the contested information is within the scope of FOIA; second, assuming that it is, the court must decide whether the information falls within any FOIA exemption. If the agency has determined that no exemption is applicable the reviewing court must examine whether the agency has applied the correct legal standards in its determination. On the other hand, if the agency has found that an exemption is applicable but disclosure is nonetheless permissible and desired, the court must review the agency's decision in light of the governing legal standards (*e.g.*, the agency's regulations) and the reasonableness of the agency's factual judgment. The court shall, however, determine on the basis of the administrative record whether the agency decision must be set aside as arbitrary or capricious. In doing so the district court cannot merely substitute its own judgment for that of the agency. When the record is deemed inadequate the court may require the agency to supplement the administrative record as to the reasons for its holding or remand to the agency for additional proceedings.[9]

---

[9] In the present case the district court considered stipulated facts and a number of affidavits submitted by General Dynamics in support of its allegations that disclosure of the information contained in the AAP's would harm General Dynamics in its competitive position and in its labor relations. As indicated, we feel this was error in that the district court review should be only upon the administrative record. This does not preclude testimony or affidavits from the administrator setting forth reasons for the agency decision. *See Camp* v. *Pitts*, 411 U.S. 138, 142-43 (1973). In the present case, at least as it concerns the AAP of the Convair Division, as in the *Chrysler* decision, the agency record is too ambiguous for the court to comprehend the rationale of the agency's holding. Under the circumstances we feel a remand by the district court to the agency is the more appropriate procedure to be followed.

In the present case the administrative record fails to disclose the underlying bases of the disclosure order of the OFCC concerning the AAP of the Convair Division. We are left in doubt as to whether the agency felt the exemptions were applicable, and, if so, whether under its regulations such disclosure would be in the public interest and would not impede the discharge of agency functions. The rationale for the conclusion of the OFCC is not set forth. Under the circumstances we deem it necessary to remand the case to the district court based solely on the inadequacy of the administrative record.

In contrast to the determination regarding the AAP of Convair, the OFCC set forth the following major points in denying the Electric Boat Division's objections to the Maritime Administration's disclosure order: (1) Electric Boat failed to meet its burden under 41 C.F.R. § 60-60.4 (d) to demonstrate that the information in question should not be disclosed under the standards set forth in 41 C.F.R. § 60-40.3; (2) disclosure of the information would not benefit competitors in submitting bids against Electric Boat on contracts; (3) FOIA exemptions are permissive rather than mandatory; and (4) disclosure of the information would benefit the public because

> [i]nternal and external dissemination of an employer's affirmative action program enables employees and potential applicants for employment to know and avail themselves of opportunities. Such dissemination enables interested persons to appreciate the detailed analysis performed by the contractor in establishing his equal employment program and the effort expended in achieving the goal.

Notwithstanding the more complete attempt to comply with its regulations, the OFCC's decision does not consider whether disclosure might affect or impede the overall effectiveness of the agency in discharging its functions. This is a standard of legal concern promulgated by the agency. Although it might be argued that the finding is implicit in the agency's order of disclosure, we think the importance of the question requires explicit evidence that the agency has in fact given consideration to this factor before ordering disclosure. The district court is at liberty to require the OFCC to supplement the administrative record in this regard or to remand the case to the agency for this determination. The district court on review must then decide whether the agency's determination is a lawful one under the standards of review set forth herein.

The order of the district court granting injunctive relief is vacated and the cause is remanded to the district court for proceedings consistent with this opinion.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

Supreme Court, U. S.
FILED
DEC 29 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1977

No. 77-922

CHRYSLER CORPORATION,

Petitioner,

—v.—

JAMES A. SCHLESINGER,
Secretary United States Department of Defense, et al.,

Respondent.

BRIEF OF *AMICUS CURIAE* ORGANIZATION RESOURCES COUNSELORS, INC. IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Attorney for Amicus Curiae

RICHARD J. BARNES
220 East Forty-Second Street
New York, New York 10017
(212) 682-4567
Attorney for
Organization Resources Counselors, Inc.

Of Counsel:

KENNETH MCCULLOCH
TOWNLEY & UPDIKE
220 East Forty-Second Street
New York, New York 10017

IN THE

Supreme Court of the United States

October Term, 1977

No. .....

CHRYSLER CORPORATION,

Petitioner,

—v.—

JAMES A. SCHLESINGER,
Secretary United States Department of Defense, et al.,

Respondent.

BRIEF OF *AMICUS CURIAE* ORGANIZATION RESOURCES COUNSELORS, INC. IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

May it Please the Court:

ORGANIZATION RESOURCES COUNSELORS, INC. respectfully submits this brief *Amicus Curiae*. All of the parties to the cause, through their counsel, have consented to this filing; their written consents have been filed with the Clerk pursuant to Rule 42.

Interest of *Amicus*

Organization Resources Counselors, Inc. (ORC) is a management firm which provides a wide variety of services to its clients, predominantly in areas involving or impacting

on industrial relations. One very important area of our work is in the area of equal employment opportunity. In this area of endeavor, ORC provides consultation services and expert assistance to many of the nation's largest employers.

In addition, as an element of its services, ORC has, since 1967, provided an opportunity for concerned employers to meet on a regular basis to discuss topical issues affecting the development and implementation of affirmative action requirements. These meetings also provide a means for employers concerned with the effective implementation of affirmative action to exchange ideas and to become better acquainted with the numerous requirements in this area imposed by the variety of state and federal laws. There are over 140 major employers who participate on a regular basis in this aspect of ORC's activities.

The effective implementation of corporate programs in the affirmative action and other areas of industrial relations requires that the consequences of various corporate actions be known and understood by those who implement them. In no area is this as important as in the area of sensitive corporate information which may become public, thereby serving as a means for competitors and others to undermine corporate policies. ORC's work with many of the nation's major employers has demonstrated to us that the misuse of sensitive company information on its utilization of persons protected by equal employment laws can serve to damage the furtherance of equal employment opportunity more than the existence of many more commonly identifiable practices.

Presently there is uncertainty in the types of company information that may be disclosed publicly and the procedures to be applied in disclosure. This legal uncertainty impacts negatively on the development of new and effective

programs to implement the national objectives of equal employment opportunity. Our interest in this case is to have the Court resolve the existing conflicts and uncertainties in the law, thereby providing ORC, its clients, and all other affected parties with a clearer understanding of their rights and obligations.

ARGUMENT

The issues presented in this case should be addressed by the Supreme Court.

(a) There is a growing conflict amongst the Circuit Courts of Appeal concerning the legal issues presented in this case.

There are at least three significant legal issues presented in the instant case which have been the subject of conflict amongst the circuits. Further compounding this conflict, these circuits have set out detailed but clearly contradictory instructions for the direction of the district courts.

The Freedom of Information Act, 5 U.S.C. 552 (hereinafter, "FOIA"), provides for certain exemptions from disclosure. Specifically, subsection (b) (4), 5 U.S.C. 552 (b) (4) indicates that the statute does not apply to matters that are "trade secrets and commercial or financial information obtained from a person and privileged or confidential." In the instant case, the Third Circuit has indicated that even if it is clear that information falls within this exemption, the federal agency which maintains it may still, in its discretion, release such information. The Third Circuit, in its opinion in this case, recognizes that the U.S. Court of Appeals for the Fourth Circuit [1] has adopted a

[1] *Westinghouse Elec. Corp.* v. *Schlesinger*, 542 F.2d 1190 (4th Cir. 1976), *cert. denied sub nom. Brown* v. *Westinghouse Elec. Corp.*, —— U.S. ——, 14 FEP Cases 1686 (1977).

contrary position which mandates that once it has been established that the subject matter information at issue fits within exemption (b) (4), such information may not be released under threat of fine or imprisonment, 18 U.S.C. 1905. The present state of the law is that if a federal agent in Richmond, Virginia releases information which falls within exemption (b) (4) he or she may be jailed and fined, whereas if a counterpart in Philadelphia refuses to release the same information it is possible[2] that his or her federal agency may not only be compelled to release that information, but also pay costs and attorneys' fees incurred by the party seeking such information.[3] In this area of conflict the Third Circuit has noted that the U.S. Circuit Courts of Appeal for the District of Columbia[4] and the Fifth Circuit support its position.[5] Not surprisingly, all of these Circuits rely upon decisions issued by this Court which, they feel, have come "closest" to giving direction on this legal issue.

A second important area of conflict concerns the manner in which this legal issue might be presented to a federal court. The Third Circuit in this case has indicated that the substantive merits of a claim that certain subject matter falls within exemption (b) (4) may not be addressed *de novo* by a federal court, but only after exhaustion of administrative remedies. Conversely, the United States Court of Appeals for the Fourth Circuit has indicated that original jurisdiction does lie in the federal courts[6] and cites to the United States Court of Appeals for the District of Columbia[7] to support its position. The United States Court of Appeals for the Fifth Circuit[8] would appear to side with the Third Circuit on this legal issue but would differ with the Third Circuit concerning the guidelines under which the administrative agency should exercise its discretion initially.[9]

[2] Such a possibility would exist, for example, if it is ultimately determined that disclosure would further the public interest and not impede the discharge of the functions of the Office of Federal Contract Compliance Programs or its compliance review agencies.

[3] Such relief is provided for by the Freedom of Information Act, 5 U.S.C. 552 (a) (4) (E).

[4] *Charles River Park "A" Inc.* v. *Department of HUD*, 519 F. 2d 935 (D.C. Cir. 1975).

[5] *Pennzoil Co.* v. *FPC*, 534 F. 2d 627 (5th Cir. 1975).

The third major conflict between the United States Circuit Court of Appeal is whether the FOIA, or any other statute, establishes standing for a corporation which has submitted data to the federal government under statutory compulsion to contest in federal court the manner in which an administrative agency proposes to release such information to the public. The Third Circuit, in the instant case, has indicated that a corporation has no right under the FOIA to determine or affect how information that it has previously furnished the federal government will be made available to third parties. The Fourth Circuit has recognized such a right under the FOIA.[10] Other circuits, on various statutory grounds, recognize such a right.[11] Whether the right exists under the FOIA, or only under the Administrative Procedure Act, 5 U.S.C. §701 et seq. (hereinafter "APA"), or under some other statutory basis be-

[6] The basis for such holding is 28 U.S.C. §1331.

[7] *Charles River Park "A"* v. *Department of HUD*, *supra*.

[8] *Pennzoil Co.* v. *FPC*, *supra*.

[9] *Comp. Pennzoil Co.* v. *FPC*, 534 F. 2d 627, 632 with *Chrysler Corp.* v. *Schlesinger*, —— F. 2d —— (3rd Cir. 1977) 15 FEP Cases 1218, 1232-1233.

[10] *Westinghouse Elec. Corp.* v. *Schlesinger*, *supra*.

[11] *Charles River Park "A", Inc.* v. *Dept. of HUD*, *supra*; *Westinghouse Elec. Corp.* v. *Schlesinger*, *supra*; *Pennzoil Co.* v. *FPC*, *supra*; *Union Oil Co. of Calif.* v. *FPC*, 542 F. 2d 1036 (9th Cir. 1976).

comes increasingly important. If, for example, the right exists only under the APA, then the right to participate becomes virtually impossible to exercise.[12]

A similar, substantial conflict on all of these issues exists in the United States District Courts. Usage of the FOIA has increased dramatically and has extended not only to the general public, but to direct market competitors,[13] and will, in all likelihood, become increasingly used by labor organizations.[14]

---

[12] Provision is made for notice to the contractor when a claim of privilege is made by the contractor at the time it submits its affirmative action program, 41 C.F.R. § 60-60.4 (d), but that provision requires specific reasons to be furnished and related to specific sections of the Affirmative Action Compliance Program ("AACP"). Providing such specificity for every AACP submitted can be very expensive and should only be required once there has been an actual request for AACP data. On the one hand, if the contractor fails to give detailed specificity, and is not entitled to a *de novo* hearing but only a review of the adminstrative record, its administrative case utilizing the APA will be weak. On the other hand, if it does give such detailed information on each occasion when it submits an AACP it may be incurring substantial and unnecessary expense. It is in this context that federal courts have been willing to entertain substantive claims of employers *de novo*. If the employer does not assert the claim of privilege at the time it submits the AACP, then there is no guarantee of its receiving any notice and the right to review under the APA becomes totally ephemeral. *See*, Connolly and Fox, *Employer Rights and Access to Documents Under the Freedom of Information Act*, 46 Fordham L. Rev. 203, 209, footnote 29 (1977).

[13] In *Firestone Tire & Rubber Co.* v. *Kleppe*, No. 76-781-A (E.D. Va. March 11, 1977), the FOIA request to the Department of Interior had been made by General Tire Co.

[14] Ironically there are presently pending actions before the National Labor Relations Board concerning the right of the International Union of Electrical Workers to obtain affirmative action program data from employers, including Westinghouse Electric Corporation. See, *Westinghouse Electric Corp. and I.U.E.*, Case No. 6-CA-7680 and *East Dayton Tool and Die Company and I.U.E.*, Local 668, No. 9-CA-8887. This decision by the Third Circuit in the instant case could possibly obviate that action since such information could be obtained from the contract compliance review agencies. Westinghouse, of course, is headquartered in Pittsburgh.

(b) The existing uncertainty in the law is inhibiting broad innovative approaches to affirmative action programs.

To meet the requirements of E.O. 11246, and to fulfill the national objective of equal employment opportunity, employers who are government contractors[15] have embarked upon novel employment programs. The basic concept of affirmative action, without reverse discrimination, mandates such an approach. Thus, employers will set goals and timetables to improve the participation rate in employment of protected class members and strive to achieve them. Where traditional efforts may not always succeed to achieve these goals, employers often embark upon novel programs to achieve the desired results.

In practice, this system leads to the development of sensitive and volatile data. For example, one of the requirements under existing government regulations is that the contractor identify promotable minorities and females and direct special affirmative action toward these persons to assist them in achieving the targeted positions.[16] Additionally there has developed, as required by other government regulations,[17] internal self audit systems designed to identify problem areas and provide for corrective action. The key element for such programs is frank self-analysis. For such a reason at least one federal district court has found such programs not subject to discovery, even during litigation, and as long ago as 1971.[18]

---

[15] There are at least 250,000 such employers who are also government contractors. See, *The Federal Civil Rights Enforcement Effort—A Reassessment, the United States Commission on Civil Rights*, January, 1975, Clearinghouse Publication, p. 27.

[16] OFCCP Revised Order No. 14, Establishing Standard Compliance 41 CFR § 60-60 *et seq.*, Attachment: Standard Compliance Review Report, Part B XII (B) (1) (2).

[17] 41 CFR § 60-2.25.

[18] *Banks* v. *Lockheed Georgia Co.*, 4 EPD (CCH) ¶ 7642 (N.D. Ga. 1971).

Affirmative Action goals have been increased in recent years by many employers to insure that protected class representation in all areas of employment would continue to grow. As a result, the number of special programs has increased. Thus, there are in existence today programs which, for example, (a) provide that a substantial portion of a manager's year-end bonus is calculated based upon achievement of affirmative action program goals and timetables; (b) rate a supervisor's overall performance on the manner in which he or she effectuates the employer's Affirmative Action Compliance Program (hereinafter AAPC); (c) provide special advisory and training programs for protected class members when they are underutilized; (d) provide for self-analysis of employees and supervisors in job performance, including performance toward achievement of AAPC goals and timetables; (e) provide for an "open door" policy to key corporate personnel for all employees who might want to voice equal employment opportunity concerns. Numerous other similar type programs are in use by employers in many areas. These programs not only enhance equal employment opportunity but they strive for equality in achievement, and to overcome educational and environmental disadvantages which might have existed in the general workforce population.

The current uncertainty in the state of the law regarding public disclosure of information and data developed to measure the success or failure of any such innovative programs, often serves to inhibit their development. Legally, employers are required to incorporate the programs, the implementing efforts undertaken, and the persons affected by such programs into the AACP which they are required to submit to the government.[19] Information

[19] 41 CFR § 60-2.13(f).

and data on these programs may include very specific discussion of changes in job structures, corporate responsibility, and critical self-evaluation on both corporate policies and personnel. Similarly, the data developed to measure either successes or failures will often of necessity identify groups of employees, their wage rates, and specific positions within the corporation. The legal requirement mandating submission of this information to the government coupled with the existing uncertainty epitomized by the legal inconsistencies previously indicated will have a chilling effect on worthwhile societal objectives. Moreover, such uncertainty has a more pernicious influence than a ruling from this Court that every program is disclosable. Employers can implement procedures and programs more effectively if they know the consequences of their actions, and can adjust their approaches to specific problems. Uncertainty, however, creates a wait-and-see attitude wherein no one benefits.

CONCLUSION

For the reasons stated the petition for a writ of certiorari should be granted.

Respectfully submitted,

Attorney for Amicus Curiae

RICHARD J. BARNES
220 East Forty-Second Street
New York, New York 10017
(212) 682-4567
Attorney for
Organization Resources Counselors, Inc.

Of Counsel:
KENNETH MCCULLOCH
TOWNLEY & UPDIKE
220 East Forty-Second Street
New York, New York 10017

December 28, 1977

Supreme Court, U.S.
FILED
DEC 27 1977
MICHAEL RODAK, JR., CLERK

No. 77-922

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

CHRYSLER CORPORATION, *Petitioner*

v.

HAROLD BROWN, et al., *Respondents.*

BRIEF OF THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, AND METROPOLITAN LIFE INSURANCE COMPANY, *AMICI CURIAE*, SUPPORTING THE PETITION

JEROME ACKERMAN
MICHAEL S. HORNE
BRUCE D. SOKLER
888 Sixteenth Street, N.W.
Washington, D.C. 20006

Attorneys for Amicus, The Prudential Insurance Company of America

J. AUSTIN LYONS
MARGARET F. KELLY
One Madison Avenue
New York, New York 10010

Attorneys for Amicus, Metropolitan Life Insurance Company

WILLIAM F. JOY
ROBERT P. JOY
One Boston Place
Boston, Massachusetts 02108

Attorneys for Amicus, John Hancock Mutual Life Insurance Company

December 27, 1977

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED	2
STATEMENT	2
INTEREST OF AMICI	2
REASONS FOR GRANTING THE PETITION	4
I. The Holding of the Court of Appeals That an Information Provider Does Not Have a Right to a *De Novo* Judicial Determination as to Whether Documents are Subject to Mandatory Disclosure Under the FOIA is in Conflict with the Holdings of Two Other Circuit Courts of Appeals and is Erroneous	6
II. The Court of Appeals' Holding that a General Housekeeping Statute, 5 U.S.C. § 301, Authorizes the Promulgation of Regulations Purporting to Release Information, Disclosure of Which Would Otherwise be Prohibited by 18 U.S.C. § 1905, is in Conflict with the Holding of Another Circuit Court of Appeals and is Erroneous	13
CONCLUSION	16

TABLE OF AUTHORITIES

CASES:

Babcock & Wilcox Co. v. *Rumsfeld*, 70 F.R.D. 595 (N.D. Ohio 1976)	13
Califano v. *Sanders*, 430 U.S. 99 (1977)	7
Camp v. *Pitts*, 411 U.S. 138 (1973)	8
Charles River Park "A", Inc. v. *Department of Housing and Urban Development*, 519 F.2d 935 (D.C. Cir. 1975)	8-10, 13-14

Page

Chrysler Corp. v. *Schlesinger*, Nos. 76-1970 and 76-2238 (3d Cir. Sept. 26, 1977) ..... passim
General Dynamics Corp. v. *Dunlop*, 427 F. Supp. 578 (E.D. Mo. 1976), *appeal pending*, No. 77-1192 (8th Cir.) 10, 13
Holiday Inns, Inc. v. *Kleppe*, 13 FEP Cases 1337 (W.D. Tenn. 1976) 13
Honeywell Information Systems, Inc. v. *National Aeronautical and Space Administration*, 1976 CCH Federal Contract Cases ¶ 80,470 (D.D.C. 1976) 15
Hughes Aircraft Co. v. *Schlesinger*, 384 F. Supp. 292 (C.D. Cal. 1974), *appeal pending*, No. 75-1064 (9th Cir.) 10
Metropolitan Life Insurance Co. v. *Usery*, 426 F. Supp. 150 (D.D.C. 1976), *cert. before judgment denied sub nom., The Prudential Insurance Company of America* v. *National Organization for Women*, —— U.S. —— (No. 76-1052, May 16, 1977), *appeals pending sub nom., National Organization for Women* v. *Social Security Administration*, Nos. 77-1270 *et al.*, (D.C. Cir., docketed March 15, 1977) 3
National Parks and Conservation Ass'n v. *Morton*, 498 F.2d 765 (D.C. Cir. 1974) 9, 11
Non-resident Taxpayer's Association v. *Municipality of Philadelphia*, 478 F.2d 456 (3d Cir. 1973) ... 15
Parkridge Hospital, Inc. v. *Blue Cross & Blue Shield of Tennessee*, 430 F. Supp. 1093 (E.D. Tenn. 1977) 13
Planning Research Corp. v. *Federal Power Commission*, 555 F.2d 970 (D.C. Cir. 1977) 7, 9
Sears, Roebuck & Co. v. *General Services Administration*, 553 F.2d 1398 (D.C. Cir.), *cert. denied.* —— U.S. —— (No. 76-1642, 1977) 5, 7, 9-10, 13
Sonderegger v. *Department of Interior*, 424 F. Supp. 847 (D. Idaho 1976) 10
Thrifty Drug Stores Co., Inc. v. *Federal Trade Commission*, 1976-2 CCH Trade Cas. ¶ 61,194 (D.D.C. 1976) 15
Westinghouse Electric Corp. v. *Nuclear Regulatory Commission*, 555 F.2d 82 (3d Cir. 1977) 15
Westinghouse Electric Corp. v. *Schlesinger*, 542 F.2d 1190 (4th Cir. 1976), *cert. denied*, —— U.S. —— (No. 76-1192, 1977) 5, 9-10, 13

Page

STATUTES:

5 U.S.C. § 301 13-14
5 U.S.C. § 552 ..... passim
5 U.S.C. § 552(a)(6)(i) 8
5 U.S.C. § 552(a)(6)(ii) 8
5 U.S.C. § 552(b)(3) 5, 10, 12-13
5 U.S.C. § 552(b)(4) 8, 10-12, 15
5 U.S.C. § 552(b)(6) 10, 12
5 U.S.C. § 706 8
18 U.S.C. § 1905 ..... 4-5, 7, 13-15
28 U.S.C. § 1331 7
42 U.S.C. § 2000e-8(e) (Section 709(e) of Title VII of the Civil Rights Act of 1964) 5, 7
44 U.S.C. § 3508 (Section 423 of the Federal Reports Act of 1942) 5, 7

MISCELLANEOUS:

Address by Former Solicitor of the Department of Labor William Kilberg on OFCCP Contract Compliance Program, Back Pay Issues, to EEO Law Conference, October 28, 1977, *reprinted in* Daily Labor Reporter at F-2—F-4 (Nov. 9, 1977) 6
Executive Order 11246, as amended 3 C.F.R. § 169 (1977) 2
General Accounting Office Report, "The Equal Employment Opportunity Program For Federal Nonconstruction Contractors Can Be Improved," GAO MWD-75-63 at 31032 (April 29, 1975) 2
Hearings on S.1160 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, 89th Cong., 1st Sess. 342-43 (1965) 11
Petition of Harold Brown, et al. for a Writ of Certiorari at 11 n.15 4

	Page
Petition for Certiorari in *GTE Sylvania, Inc.* v. *Consumers Union of the United States, Inc.*, No. 77-508, filed October 3, 1977	5
Petition for a Writ of Certiorari in *The Prudential Insurance Company of America* v. *National Organization for Women*, No. 76-1052 (filed January 31, 1977)	5
Reply Brief for the Appellees-Cross-Appellants, *National Organization for Women* v. *Social Security Administration*, Nos. 77-1270 *et al.* (D.C. Cir. filed October 18, 1977)	3
5 C.F.R. Part 294	11
21 C.F.R. § 4.45	11
24 C.F.R. Part 15	11
28 C.F.R. Part 16	11
31 C.F.R. Part 1	11
32 C.F.R. § 286.11(d)(4)(ii)	11
40 C.F.R. §§ 2.203 and 2.204(d)(1)(i)	11
41 C.F.R. §§ 60-1.1	2
41 C.F.R. Part 60-40	14
41 C.F.R. § 60-60.4(d)	12
43 C.F.R. § 2.13(h)	11
49 C.F.R. Part 7	11
104 Cong. Rec. 7550 (1958)	14
H. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966)	11
S. Rep. No. 813, 89th Cong., 1st Sess. 3, 9 (1965)	11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No.

CHRYSLER CORPORATION, *Petitioner*

v.

HAROLD BROWN, et al., *Respondents.*

BRIEF OF THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, AND METROPOLITAN LIFE INSURANCE COMPANY, *AMICI CURIAE*, SUPPORTING THE PETITION

Amici have received and filed with the Clerk of this Court letters from counsel for Petitioner and Respondents consenting to the filing of this Brief in Support of the Petition for Certiorari.

OPINIONS BELOW

The opinions below are properly listed in and appended to the petition for a writ of certiorari filed by Chrysler Corporation.

JURISDICTION

The amici adopt the petitioner's statement of jurisdiction.

QUESTIONS PRESENTED

1. In a suit brought by a provider of information to the government to prevent disclosure of that information to a private requester under the Freedom of Information Act, whether the trial court can determine *de novo* if the information is subject to mandatory disclosure under the Act.

2. Whether an agency may properly promulgate regulations based upon the authority of the general housekeeping statute, 5 U.S.C. § 301, which purport to authorize release of information, disclosure of which would otherwise be prohibited by 18 U.S.C. § 1905.

STATEMENT

The amici adopt the statement of petitioner.

INTEREST OF AMICI

Pursuant to Executive Order 11246, as amended, 3 C.F.R. § 169 (1977), and regulations promulgated by the Secretary of Labor, 41 C.F.R. §§ 60-1.1, *et seq.*, amici, like the petitioner and thousands of others,[1] are required as government contractors to prepare and either make available for inspection or file with the government Affirmative Action Plans ("AAPs") and Employment Information Reports EEO-1 ("EEO-1 reports"), setting forth very detailed information on

[1] The Department of Labor has estimated that there are more than 275,000 federal non-construction contractors subject to its Executive Order 11246 and that number would be even higher if federal construction contractors were included. *See* General Accounting Office Report, "The Equal Employment Opportunity Program For Federal Nonconstruction Contractors Can Be Improved," GAO MWD-75-63 at 31-32 (April 29, 1975).

present and projected employment and promotions both for the employer's total work force and separately for women and minority group members.

Amici as cross-claimants (and plaintiff) have brought "reverse" Freedom of Information Act ("FOIA") suits to prevent disclosure of such data. These suits are presently pending, on appeals and cross appeals from the partial grant and partial denial of preliminary injunctions, in the United States Court of Appeals for the District of Columbia Circuit. *Metropolitan Life Insurance Co.* v. *Usery,* 426 F. Supp. 150 (D.D.C. 1976), *cert. before judgment denied sub nom., The Prudential Insurance Company of America* v. *National Organization for Women,* —— U.S. —— (No. 76-1052, May 16, 1977), *appeals pending sub nom., National Organization for Women* v. *Social Security Administration,* Nos. 77-1270 *et al.* (D.C. Cir., docketed March 15, 1977). The government is urging in that litigation that the applicable precedents of the District of Columbia Circuit are in error and the instant case should be followed. *See* Reply Br. for the Appellees Cross-Appellants at 2-8, 17-18, *National Organization for Women* v. *Social Security Administration,* Nos. 77-1270 *et al.* (D.C. Cir., filed October 18, 1977).

Amici, like the petitioner, believe that disclosure of such confidential data, to any and all requesters, would cause them serious competitive and business harm and unjustifiably invade the privacy of their employees. While amici are optimistic about prevailing in the District of Columbia Circuit on the issues raised here, since the District of Columbia precedents dictate rejection of the result reached by the Third Circuit in the present case, amici nonetheless face the threat that other FOIA requests for similar information could

arise in the Third Circuit and could, under the decision below, thereby produce the same irreparable harm as amici seek to prevent in the District of Columbia Circuit.

Amici, therefore, have vital interests in the issues raised by the instant petition. If the Court decides to undertake plenary consideration of the issues raised by the petition it will be disposing of questions central to the reverse FOIA case currently pending in the United States Court of Appeals for the District of Columbia Circuit.[2] On the other hand if review were denied, amici would be bound by the Third Circuit decision in any case arising there and would be inevitably forced by the government to defend against that decision in any FOIA or reverse FOIA controversy.

REASONS FOR GRANTING THE PETITION

This case is another example of the burgeoning number of so-called "reverse FOIA" suits by private information providers seeking to prevent the federal government from releasing privately-supplied information to non-government third parties.[3] The government receives enormous amounts of information from private parties—not merely data on equal employment

[2] Both the federal defendants and the information requester have challenged in the District of Columbia action the district court's *de novo* determination of the mandatory disclosure issue and have argued that the OFCCP regulations authorize discretionary release of information which falls within 18 U.S.C. § 1905.

[3] During 1976 alone, at least 78 reverse FOIA suits were brought against the government. Petition of Harold Brown, Secretary of Defense, et al. for a Writ of Certiorari at 11 n.15, Brown v. Westinghouse Electric Corp. (No. 76-1192, filed Feb. 28, 1977).

but also vast quantities of commercial, technical, and financial information, as well as information to which significant privacy interests attach—and competitors and others are seeking to gain access to that data via the FOIA. As a result of this activity, at least four other petitions for a writ of certiorari have been filed in the last twelve months by both the Solicitor General and private information providers seeking Supreme Court review of various procedural and substantive issues arising in reverse FOIA lawsuits.[4] Private parties have heretofore generally sought to raise substantive issues, some which were only relevant to the confidentiality of equal employment data.[5] The government, however, both here and in the lower courts, has advocated rules of law which would eliminate effective rights to preserve the confidentiality of all manner of privately supplied data, by denying *de novo* review and by permitting the government unbridled discretion to release data from private submitters although the data are clearly exempt from mandatory disclosure under the FOIA. Now for the first time a court of appeals has accepted the government's con-

[4] The Prudential Insurance Company of America v. National Organization for Women, No. 76-1052, petition filed January 31, 1976, *cert. before judgment denied*, May 16, 1977; Brown v. Westinghouse Electric Corporation, No. 76-1192, petition filed February 28, 1977, *cert. denied*, May 16, 1977; Sears, Roebuck & Co. v. General Services Administration, No. 76-1642, petition filed May 23, 1977, *cert. denied*, November 3, 1977; GTE Sylvania, Inc. v. Consumers Union of the United States, Inc., No. 77-508, petition filed October 3, 1977.

[5] For example, in their petition for a writ of certiorari before judgment in No. 76-1052, amici sought plenary consideration of whether 42 U.S.C. § 20003-8(e), 44 U.S.C. § 3508(a) and 18 U.S.C. § 1905 are incorporated into the (b)(3) exemption to the FOIA. Petition for a Writ of Certiorari at 3, The Prudential Insurance Company of America v. National Organization for Women, *supra*.

tentions, and as a result innumerable private parties, at least in the Third Circuit, may be rendered incapable of protecting the confidentiality of their information.

Thus far the Court has not chosen to grant any of the petitions in reverse FOIA cases, thereby permitting the lower courts to develop more fully the state of the law in this area. However, there are now stark and diametric conflicts among Circuit Courts of Appeals on very fundamental questions in this area, and absent plenary review by the Court of the instant petition, the procedural scope of all reverse FOIA suits and the substantive law applied in such suits will depend on the happenstance of the judicial circuit in which a suit is pending.[6]

I. The Holding of the Court of Appeals That An Information Provider Does Not Have A Right To A *De Novo* Judicial Determination As To Whether Documents Are Subject To Mandatory Disclosure Under the FOIA Is In Conflict With the Holdings of Two Other Circuit Courts of Appeals and Is Erroneous.

In conformity with all other courts considering the question, the Third Circuit found that a provider of information to the government may bring an action to prevent disclosure of that information to a Freedom

[6] In a recent speech, former Solicitor of the Department of Labor William Kilberg noted that the Third Circuit's decision "differs with both its sister circuits" and that "[t]his issue is now ripe for Supreme Court review." Address by Former Solicitor of Labor William Kilberg on OFCCP Contract Compliance Program, Back Pay Issues, to EEO Law Conference, October 28, 1977, *reprinted in* Daily Labor Reporter at F-2—F-4 (Nov. 9, 1977).

of Information Act requester.[7] The court of appeals also recognized that Congress was concerned that "disclosure of certain information might injure interests in privacy or confidentiality which may be as important as the public's right to general access to agency information" and that "disclosure of submitter information is qualitatively different from disclosure of data directly relating to government operations, and that the interest in privacy appears stronger with respect to the former than the latter." (22a)

Nevertheless, primarily on the basis of its conclusion that the FOIA exemptions are permissive and not mandatory, the Third Circuit found that a provider of information to the government has no right to a judicial determination *de novo* as to whether documents are subject to mandatory disclosure under the FOIA.[8] Instead, the court of appeals concluded that the only cause of action an information provider had standing to raise was one for judicial review under the Administrative Procedure Act ("APA"), and that the proper scope of that review is limited to the hurriedly compiled

[7] Subsequent to this Court's opinion in Califano v. Sanders, 430 U.S. 99 (1977), the courts, including the court of appeals here, have uniformly found that jurisdiction for a reverse FOIA lawsuit is based on 28 U.S.C. § 1331. *See, e.g.*, Planning Research Corp. v. Federal Power Commission, 555 F.2d 970 (D.C. Cir. 1977); Sears, Roebuck & Co. v. General Services Administration, 553 F.2d 1398 (D.C. Cir.), *cert. denied*, —— U.S. —— (No. 76-1642, 1977); Chrysler Corp. v. Schlesinger, Nos. 77-1970 and 76-2238, at 18a.

[8] The court of appeals considered and rejected causes of action arising under the Freedom of Information Act, 18 U.S.C. § 1905, 42 U.S.C. § 2000e-8(e) (Section 709(e) of Title VII of the Civil Rights Act of 1964); and 44 U.S.C. § 3508 (Section 423 of the Federal Reports Act of 1942) (22a-26a, 30a-35a).

administrative record[9] as to whether the decision to disclose was arbitrary, capricious or an abuse of discretion.[10]

As the Third Circuit's opinion seems to concede, the rejection by that court of an information provider's right to a *de novo* determination of the mandatory disclosure question stands in direct conflict with both the District of Columbia and Fourth Circuit Courts of Appeals.[11] In *Charles River Park "A", Inc.* v. *Department of Housing and Urban Development,* 519 F.2d 935, 940 and n.4 (D.C. Cir. 1975), the court of appeals directed the district court to hold an evidentiary hearing and determine *de novo* whether the information in question fell within the fourth exemption to the FOIA, 5 U.S.C. § 552(b)(4). The court recognized that this hearing "would not be a *de novo* evidentiary hearing on the facts constituting the basis for the agency's decision. Such a hearing would not, of course, be appropriate under *Camp* v. *Pitts,* 411 U.S. 138, 93 S.Ct. 1241, 36 L. Ed.2d 106 (1973)." Instead, the court instructed:

---

[9] The FOIA requires that an agency determine within ten working days whether to comply with a request under the Act. 5 U.S.C. § 552(a)(6)(i). Any administrative appeal is to be determined within twenty working days. *Id.* § 552(a)(6)(ii). These stringent time limits followed by government officials make it virtually impossible for information submitters to develop a full agency record.

[10] 35a-39a; *see* 5 U.S.C. § 706. The government originally took the position in *Chrysler* that an information submitter had *no* right to contest judicially an agency decision to disclose the *submitter's* information pursuant to a FOIA request. Later it conceded that judicial review pursuant to the APA was available (35a), a totally inadequate review in these circumstances.

[11] *See, e.g.,* 23a, 37a-38a.

> "A plaintiff in a suit such as this is obviously entitled to no relief if the government could be forced to disclose the information it wishes to reveal in a suit under the FOIA. Thus, the district court should hold a hearing to determine whether the information involved here would have been exempt just as it would if a suit had been brought under the FOIA to compel disclosure. *See* 5 U.S.C. § 552(b)(3); *National Parks and Conservation Association* v. *Morton* [498 F.2d 765 (D.C. Cir. 1974)]. In holding this hearing the district court is not reviewing agency actions; it is making a threshhold determination whether the plaintiff has any cause of action at all."

The District of Columbia Circuit has reaffirmed its position that an information submitter has a right arising under the FOIA to a *de novo* determination whether information is subject to mandatory disclosure under the Act. *See Sears, Roebuck & Co.* v. *General Services Administration,* 553 F.2d 1398 (D.C. Cir.), *cert. denied,* —— U.S. —— (No. 76-1642, Nov. 3, 1977); *Planning Research Corp.* v. *Federal Power Commission,* 555 F.2d 970 (D.C. Cir. 1977).

The Fourth Circuit in *Westinghouse Electric Corp.* v. *Schlesinger,* 542 F.2d 1190 (4th Cir. 1976), *cert. denied,* —— U.S. —— (No. 76-1192, 1977), reached the identical conclusion. Recognizing that the agency may not fully vindicate the rights of an information supplier, the court reasoned:

> "Should not the person who was threatened with harm through a disclosure, which Congress had indicated clearly is against the public policy as expressed in the FOIA itself be the proper one to assert that right to protection from disclosure assured him under Exemption four, in an equity

> action in which he can have a *de novo* trial? The envious competitor or the curious busybody demanding access to that private information has the right to such a *de novo* trial. The Act gives it to him. But is not the same right to be implied, when the supplier, with a right that Congress gave him 'not only as a matter of fairness but as a matter of right,' seeks what may be regarded as correlative relief?" 542 F.2d at 1213.

Several district courts in still other circuits have also found that a *de novo* inquiry is appropriate in reverse FOIA cases. *See Sonderegger* v. *Department of Interior,* 424 F. Supp. 847 (D. Idaho 1976); *General Dynamics Corp.* v. *Dunlop,* 427 F. Supp. 578 (E.D. Mo. 1976), *appeal pending,* No. 77-1192 (8th Cir.); *Hughes Aircraft Co.* v. *Schlesinger,* 384 F. Supp. 292 (C.D. Cal. 1974), *appeal pending,* No. 75-1064 (9th Cir.).

The Third Circuit's decision is not only in conflict with two other courts of appeals and several district courts, but is erroneous. The court of appeals placed significant reliance in reaching its conclusion that *de novo* review was not available on its view that the FOIA exemptions were permissive, not mandatory. (23a-25a) Yet the District of Columbia Circuit, while viewing the exemptions as permissive, has consistently ruled that a *de novo* judicial determination on the mandatory disclosure issue was available. *See Sears, Roebuck & Co.* v. *General Services Administration, supra; Charles River Park "A", Inc.* v. *Department of Housing and Urban Development, supra.*

More fundamentally, the Third Circuit's decision fails to effectuate Congressional concerns the court itself recognized—that disclosure of information falling within the (b)(3), (b)(4) and (b)(6) exemptions might have overriding privacy and confidentiality in-

terests and that the Congressional purpose in mandating disclosure of government operations does not dictate disclosure of privately submitted information.[12] The limited review based on the agency's record endorsed by the court of appeals fails to implement the Congressional recognition of non-governmental confidentiality, commercial and privacy interests embodied in the exmeptions to the FOIA.

The FOIA contains no provision that a submitter receive notice from an agency before its documents are disclosed. While a few agencies do provide for notice to submitters in their regulations implementing the FOIA, *e.g.,* 32 C.F.R. § 286.11 (d)(4)(ii) (Department of Defense), a significant number of agencies do not. *See, e.g.,* 28 C.F.R. Part 16 (Department of Justice); 24 C.F.R. Part 15 (Department of Housing and Urban Development); 49 C.F.R. Part 7 (Department of Transportation); 31 C.F.R. Part 1 (Treasury Department); 5 C.F.R. Part 294 (Civil Service Commission). Other agencies only provide notice in what they consider to be close questions on the applicability of the (b)(4) exemption or when it is administratively feasible to do so. *See, e.g.,* 40 C.F.R. §§ 2.203 and 2.204(d)(1)(i) (Environmental Protection Agency); 43 C.F.R. § 2.13(h) (Department of Interior); 21 C.F.R. § 4.45 (Food and Drug Administration). The OFCCP does not provide notice but directs that a contractor must demonstrate at the time

---

[12] *See, e.g.,* S. Rep. No. 813, 89th Cong., 1st Sess. 3, 9 (1965); H. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966); Hearings on S.1160 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, 89th Cong., 1st Sess. 342-43 (1965). *See also* National Parks and Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1974).

the government takes possession of the documents why the information is not subject to disclosure pursuant to the FOIA. 41 C.F.R. § 60-60.4(d). Such a procedure of creating a complete administrative record every time a document is submitted—whether or not the information ever becomes the subject of a FOIA request—would become an inevitable by-product of the court of appeals' ruling and obviously add tremendous administrative burdens and expense to both government and private information providers.

Further, the FOIA does not require agency findings or even that the agency consider the information provider's submissions. Coupled with the statutory time limitations in the FOIA, these factors virtually ensure that there may well be little, if any, administrative record to review by the court. Even in the instant case, where the agency did permit submissions by Chrysler and made some sort of written record of its intent to disclose the documents, the court of appeals found the agency record insufficient to permit even its limited view of judicial review and directed a remand to the agency. (39a-40a) Yet the court of appeals found that this obviously inadequate procedure was sufficient to vindicate those commercial and privacy rights which Congress sought to protect in 5 U.S.C. § 552(b)(3), (4) and (6). And absent plenary consideration by this Court, the scope of the judicial inquiry in reverse FOIA lawsuits will differ depending upon the judicial district in which the action was brought.

II. The Court of Appeals' Holding That A General Housekeeping Statute, 5 U.S.C. § 301, Authorizes the Promulgation of Regulations Purporting To Release Information, Disclosure of Which Would Otherwise Be Prohibited By 18 U.S.C. § 1905, Is In Conflict With The Holding Of Another Circuit Court of Appeals and Is Erroneous.

18 U.S.C. § 1905 prohibits an officer or employee of any federal department or agency "to any extent not authorized by law" from disclosing information which concerns or relates "to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation or association." Numerous lower courts have held that Section 1905 affects an agency's authority to release information pursuant to a FOIA request, either as an absolute prohibition on disclosure through its incorporation under the (b)(3) exemption to the FOIA [13] or as a check on an agency's discretionary power to release of information exempt from FOIA disclosure.[14]

---

[13] *See* Westinghouse Electric Corp. v. Schlesinger, 542 F.2d 1190 (4th Cir. 1976), *cert. denied*, —— U.S. —— (No. 76-1192, 1977); General Dynamics Corp. v. Dunlop, 427 F. Supp. 578 (E.D. Mo. 1976), *appeal pending*, No. 77-1192 (8th Cir.); Holiday Inns, Inc. v. Kleppe, 13 FEP Cases 1337 (W.D. Tenn. 1976); *cf.*, Sears, Roebuck & Co. v. General Services Administration, 553 F.2d 1378 (1977), *cert. denied*, —— U.S. —— (1977).

[14] *See* Charles River Park "A", Inc. v. Department of Housing and Urban Development, 519 F.2d 935 (D.C. Cir. 1975); Babcock & Wilcox Co. v. Rumsfeld, 70 F.R.D. 595 (N.D. Ohio 1976); Parkridge Hospital, Inc. v. Blue Cross & Blue Shield of Tennessee, 430 F. Supp. 1093 (E.D. Tenn. 1977).

The court of appeals here, however, found that 5 U.S.C. § 301, the so-called housekeeping statute [15] provided authority for regulations which would meet the "authorized by law" exception to the criminal prohibitions of 18 U.S.C. § 1905. The court of appeals then concluded that the OFCCP regulations, 41 C.F.R. Part 60-40, were promulgated pursuant to 5 U.S.C. § 301 and made 18 U.S.C. § 1905 inapplicable to the various affirmative action documents at issue in this case. (26a-30a) In reaching this holding, the court of appeals acknowledged that it was in direct conflict with the District of Columbia Circuit's opinion in *Charles River Park "A", Inc.* v. *Department of Housing and Urban Development, supra,* 519 F.2d 942-43. (29a) The court of appeals in *Charles River Park* relied on the legislative history to the 1958 amendment to section 301, and noted specifically the statement by the amendment's sponsor that the amendment did "not affect the confidential status of information given to the government and carefully detailed in Title 18 United States Code, Section 1905." 104 Cong. Rec. 6550 (1958). The District of Columbia Circuit therefore concluded that "section 301 does not authorize regulations limiting the scope of section 1905." 519 F.2d at 942-43.

The District of Columbia Circuit's view is clearly correct. Rejecting the legislative history which the

[15] 5 U.S.C. § 301 provides in pertinent part:

"The head of an executive department or military department may prescribe regulations for . . . the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public."

District of Columbia found persuasive [16] the court of appeals' holding dictates that Congress has delegated to every agency in the government the authority to decide to what extent—if any—employees of that agency will be bound by a provision of the United States Criminal Code. If sustained, the Third Circuit's decision would mean that highly confidential commercial and financial data [17] which hundreds of agencies collect could be given away virtually at the whim of any government official. The Third Circuit renders both the (b)(4) exemption to the FOIA and 18 U.S.C. § 1905 toothless admonitions. This cannot be.

[16] 29a. The court of appeals principally relied on its two previous decisions in Westinghouse Electric Corp. v. Nuclear Regulatory Commission, 555 F.2d 82 (3d Cir. 1977) and Non-resident Taxpayers Association v. Municipality of Philadelphia, 478 F.2d 456 (3d Cir. 1973). Both cases contain only brief reference to Section 301 and no analysis of the legislative history of that section.

[17] *See, e.g.,* Honeywell Information Systems, Inc. v. National Aeronautical and Space Administration, 1976 CCH Federal Contract Cases ¶ 80,470 (D.D.C. 1976); Thrifty Drug Stores Co., Inc. v. Federal Trade Commission, 1976-2 CCH Trade Cas. ¶ 61,194 (D.D.C. 1976).

CONCLUSION

For the foregoing reasons, amici urge that the petition for writ of certiorari be granted.

Respectfully submitted,

JEROME ACKERMAN
MICHAEL S. HORNE
BRUCE D. SOKLER
888 Sixteenth Street, N.W.
Washington, D.C. 20006

Attorneys for Amicus, The Prudential Insurance Company of America

J. AUSTIN LYONS
MARGARET F. KELLY
One Madison Avenue
New York, New York 10010

Attorneys for Amicus, Metropolitan Life Insurance Company

WILLIAM F. JOY
ROBERT P. JOY
One Boston Place
Boston, Massachusetts 02108

Attorneys for Amicus, John Hancock Mutual Life Insurance Company

December 27, 1977

FILED
DEC 28 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

NO. 77-922

CHRYSLER CORPORATION,
Petitioner,

v.

HAROLD BROWN, et al,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF GULF OIL CORPORATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

JESSE P. LUTON, JR.
BURTON C. BRANSTETTER
JOSEPH H. SPERRY
P. O. Box 3725
Houston, Texas 77001
Attorneys for Amicus Curiae

December 22, 1977

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

TABLE OF CONTENTS

	Page
INTEREST OF AMICUS CURIAE	2
IMPORTANCE OF CASE AND NEED FOR REVIEW	2
THE ISSUE	3
ARGUMENT AND AUTHORITIES	3
CONCLUSION	8

TABLE OF AUTHORITIES

CASES

	Page
American Mail Line, Ltd. v. Gulick, 411 F.2d 696 (D.C. Cir. 1968)	5
Epstein v. Resor, 421 F.2d 930 (9th Cir. 1970)	5
Legal Aid Society of Almeda County v. Schultz, 349 F. Supp. 71 (N.D. Cal. 1972)	5
Soucie v. David, 448 F.2d 1067 (D.C. Cir. 1971)	6
Wellford v. Hardin, 444 F.2d 21 (4th Cir. 1971)	5
Westinghouse Electric Corp. v. Schlesinger, 392 F. Supp. 1246 (E.D. Va. 1974)	4
392 F. Supp at 1250	4
542 F.2d at 1210-11	4
542 F.2d at 1213	5

STATUTES

Freedom of Information Act, 5 U.S.C. § 5529 (1967)	2
Act of June 11, 1946, ch. 324, § 3, 60 Stat. 238	6

MISCELLANEOUS

H.R. Rep. No. 1497, 89th Cong., 2d Sess. 13 (1966)	6
Hearings on S. 1666 Before the Subcomm. on Admin. Practice and Procedure of the Senate Comm. on the Judiciary, 88th Cong., 1st Sess. 199 (1964)	3, 4, 5
Hearings on the Administration and Operation of the Freedom of Information Act Before A Subcomm. of the House Comm. on Government Operations, 92d Cong., 2d Sess. 1619, 2114 (1972)	3, 4

	Page
Hearings on S. 1335 Before The Senate Committee on the Judiciary, 89th Cong., 1st Sess. 436-437 (1965)	4
Would Macy's Tell Gimbel's: Government Controlled Business Information and the Freedom of Information Act, Forwards & Backwards, 6 Loyola L.J. 594, 611 (1975)	7
O'Reilly, Government Disclosure of Private Secrets Under the Freedom of Information Act, 30 Bus. Lawyer 1125, 1134 (1975)	8

IN THE

Supreme Court of the United States

NO. _____

CHRYSLER CORPORATION,
Petitioner,

v.

HAROLD BROWN, et al,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

---

BRIEF OF GULF OIL CORPORATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

Gulf Oil Corporation (hereinafter "Gulf") files this brief as *Amicus Curiae* to urge the court to grant the Petition for a Writ of Certiorari to review the decision of the United States Court of Appeals (3rd Circuit) entered in this case on September 26, 1977. All parties to this action have consented to the filing of this brief.

INTEREST OF AMICUS CURIAE

Gulf is a plaintiff in a reverse Freedom of Information Act[1] (hereinafter "FOIA") case almost identical to *Chrysler*.

The business community, including Gulf, submits vast amounts of information to a myriad of federal agencies, much of which is confidential, such as chemical formulations of its products, estimated reserves of potential production of oil as well as identical matter at issue in *Chrysler* dealing with Affirmative Action Plans (AAP), compliance reviews and informative reports which go into minute detail as to the numbers of employees, their wages, duties, classifications, as well as future operational and organizational plans. Much of this information is private and proprietary and the confidential status of that information will be affected by the Supreme Court's ruling in *Chrysler*.

IMPORTANCE OF CASE AND NEED FOR REVIEW

There are a substantial number of reverse FOIA cases now pending in federal courts and more are being filed every day. Not only are there conflicting opinions in United States Courts of Appeal on such fundamental questions as: (1) the scope of judicial review of an agency's decisions to disclose; and (2) the type of information to be protected as confidential under statutes such as 18 U.S.C. ¶ 1905 and 5 U.S.C. ¶ 552(b), etc., there is even wider conflict among *federal agencies* concerning the manner in which disputes over disclosure should be handled.

1. Freedom of Information Act, 5 U.S.C. §5529 (1967).

Lower federal courts, federal agencies and suppliers of information have a compelling need for guidance from this Court in handling such issues, and unless such issues are resolved in a manner which properly and adequately protects the rights of submitters of *private* information, private companies and individuals will be discouraged from the submission of information necessary for effective implementation of legitimate regulatory government programs.

THE ISSUE

THE GUT ISSUE IN ALL REVERSE FOIA CASES WHERE AN INDIVIDUAL OR CORPORATION IS PLAINTIFF IS WHETHER THE FOIA AUTHORIZES THE DISCLOSURE OF *PRIVATE* RECORDS AND INFORMATION SUBMITTED TO THE GOVERNMENT IN CONFIDENCE AS WELL AS DISCLOSURE OF *GOVERNMENT* RECORDS.

ARGUMENT AND AUTHORITIES

It is perfectly clear from a plain reading of the FOIA and the Congressional Reports dealing with it that the intent and purpose of the FOIA was and is to make available to the public information concerning records and actions of the various *governmental agencies* and was not intended to make public reports, plans and data confidentially submitted to the government by *private parties*.[2] It

2. *Hearings on S. 1666 Before the Subcomm. on Admin. Practice and Procedure of the Senate Comm. on the Judiciary*, 88th Cong., 1st Sess. 199 (1964) (hereinafter "Hearings on S. 1666"). (emphasis added).
Hearings on the Administration and Operation of the Freedom of Information Act Before A Subcomm. of the House Comm. on Gov-

should be noted that the information contained in the materials which Chrysler seeks not to have disclosed concerns *only* records and actions of Chrysler and is totally unrelated to any past or future actions of any Federal agency. Gulf's position is, then, that disclosure of these materials would be contra to the basic purposes of the FOIA.

The Court in the *Westinghouse* case[3] is one of the few courts to face this issue directly and observed that:

> "the Act was intended, to use the language of the Senate report, to set up workable standards for what records should and should *not* be open to the public for inspection."[4]

The FOIA was intended, and properly so, to foster full disclosure of *government* information to the public and the exemptions to the Act were specifically designed to create categories of information which Congress intended would not be disclosed. Consequently, while the FOIA exemptions should be narrowly construed concerning disclosure of information relating to the *government "agency's* actions, plans and policies", the exemptions should be given a considerable greater breadth with respect to disclosure of information concerning the "'actions, plans and policies' of *private* parties."[5] This

ernment Operations, 92d., 2d Sess. 1619, 2114 (1972) (hereinafter called *"Government Operations Committee Hearings"*). ....
Hearings on S. 1335 Before The Senate Committee on the Judiciary, 89th Cong., 1st Sess. 436-437 (1965).

3. *Westinghouse Electric Corp. v. Schlesinger*, 392 F. Supp. 1246 (E.D. Va. 1974).

4. 542 F.2d at 1210-11 (footnote omitted).

5. *Westinghouse Electric Co. v. Schlesinger, supra*, 392 F. Supp. at 1250.

is because the FOIA "was not enacted for the purpose of enabling the public to obtain information about *individuals* and *corporations*, about what those individuals or corporations were doing, or about what their activities and policies are * * *;" rather "[t]he purpose of the . . . Act was to protect the people's right to obtain information about their *government*, to know what their *government* is doing, and to obtain information about *government* activities and policies."[6]

The Ninth Circuit stated in *Epstein v. Resor*, 421 F.2d 930 (9th Cir. 1970), that the legislative purpose of the FOIA was to make it easier for private citizens to secure *government* information. It has also been noted by the Fourth Circuit that the FOIA was designed to guarantee the public's right to know how the *government* is discharging its duty to protect the public interest,[7] saying:

> "An exploration of the legislative history behind [the FOIA] reveals that the premier purpose of the act was to elucidate the availability of *government records and actions* to the American citizen. In addition, Congress sought to eliminate much of the vagueness of the old law . . ." *American Mail Line, Ltd. v. Gulick*, 411 F.2d 696 (D.C. Cir. 1968). (Emphasis added)

It is also apparent from the discussion of the legislative history of the FOIA in *Legal Aid Society of Almeda County v. Schultz*, 349 F. Supp. 71 (N.D. Cal. 1972),

6. *Westinghouse Electric Corp. v. Schlesinger, supra*, 542 F.2d at 1213. See also *Hearings on S. 1666, supra*, at 174 ("We can see no reason for changing the ground rules of American business so that any person can force the Government to reveal information which relates to the business activities of his competitor.").

7. *Wellford v. Hardin*, 444 F.2d 21 (4th Cir. 1971).

that the intent of Congress in drafting the FOIA was to eliminate loopholes in the predecessor statute[8] which allowed agencies to deny disclosure of legitimate *governmental* information to the public saying:

> "The reports of both the House of Representatives and of the Senate condemn the practices this loosely drafted statute permitted. The House Report notes:
>
> > In the time it takes for one generation to grow up and prepare to join the Councils of Government—from 1946 to 1966—the law which was designed to provide public information about *government activities* has become the government's major shield of secrecy.
>
> H.R. Rep. No. 1497, 89th Cong., 2d Sess. 13 (1966).
>
> The Senate Report adds the important observation that:
>
> > 'innumerable times it appears that information was withheld only to cover embarrassing mistakes or irregularities . . .' S. Rep. No. 813, . . ." (Emphasis added)

The foregoing discussion by the Legal Aid Court emphasizes that the former and present Freedom of Information statutes were intended by Congress to provide full disclosure of governmental records and activities.

The Court of Appeals for the D. C. Circuit has clearly stated that the chief purposes of the new act were to increase public access to *governmental records* by substituting limited categories of privilged material for the discretionary standards applicable under the old law, and by providing an *effective judicial remedy*.[9]

8. Act of June 11, 1946, ch. 324, §3, 60 Stat. 238.

9. *Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971).

It is noteworthy that the judicial remedy referred to by the *Soucie* court as having been provided by the FOIA is available only to one seeking to enjoin an agency from *withholding* agency records. The fact that no judicial remedy is provided to a party seeking to prevent an agency from *disclosing* records in the agency's possession is a further indication that the statute is aimed only at the disclosure of *agency* records and is not applicable to the disclosure by the agency of the records of *private* individuals or corporations which may be in the agency's possession. *Had the Act been intended to compel the production of private records, it would have likewise provided a judicial remedy to prevent their wrongful disclosure.*

It would seem fundamental that *private* information and *private* documents do not lose their *private* character merely because such documents have been submitted to a *governmental agency* either pursuant to a mandatory filing requirement or voluntarily in an effort to either comply with a regulatory program or cooperate with a governmental fact finding agency.[10]

One commentator states that there is a

> "philosophical distinction between exemption (4) and Government information generally; the general public has no claim to a business' secret or a financial ledger, as it might to a government-generated highway map or agency interpretative bulletin . . . [T]here is a significant policy justification for not 'giving away for free' what private industry, *not Government*, has paid for. Government's duty to re-

10. *See* Note, *Would Macy's Tell Gimbel's: Government Controlled Business Information and the Freedom of Information Act, Forwards & Backwards*, 6 Loyola L.J. 594, 611 (1975).

veal *its* inner workings provides no similar justification for the disclosure of private parties' operations."[11]

CONCLUSION

For the reasons stated, the information sought to be disclosed in *Chrysler* is *private* and not *governmental* information, should not be disclosed and this court should grant the Petition for Writ of Certiorari to put to rest this fundamental concept of the FOIA.

Respectfully submitted,

JESSE P. LUTON, JR.
BURTON C. BRANSTETTER
JOSEPH H. SPERRY
Attorneys for
Gulf Oil Corporation,
Amicus Curiae

December 22, 1977

---

11. O'Reilly, *Government Disclosure of Private Secrets Under the Freedom of Information Act*, 30 Bus. Lawyer 1125, 1134 (1975).

Supreme Court, U. S.
FILED
JAN 12 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-922

CHRYSLER CORPORATION,

Petitioner,

v.

HAROLD BROWN, *et al.*,

Respondents.

BRIEF *AMICUS CURIAE* ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF THE PETITION OF CHRYSLER CORPORATION FOR A WRIT OF CERTIORARI

ROBERT L. ACKERLY
THOMAS L. PATTEN
KENNETH W. WEINSTEIN
SELLERS, CONNER & CUNEO
1625 K Street, N.W.
Washington, D.C. 20006

LAWRENCE B. KRAUS
CHAMBER OF COMMERCE OF THE UNITED STATES

STANLEY T. KALECZYC
NATIONAL CHAMBER LITIGATION CENTER, INC.
Attorneys for the Chamber of Commerce of the United States

Washington, D.C. • THIEL PRESS • (202) 638-4521

TABLE OF CONTENTS

Page

INTEREST OF THE *AMICUS CURIAE* 1
REASONS FOR GRANTING THE WRIT 3
CONCLUSION 17
APPENDIX A 1a

TABLE OF AUTHORITIES

Cases:

Associated Dry Goods Corp. v. EEOC, 419 F.Supp. 814 (E.D. Va. 1976) 4
Babcock & Wilcox Co. v. Rumsfeld, 70 F.R.D. 595 (N.D. Ohio 1976) 4, 7
Burroughs Corp. v. Schlesinger, 403 F.Supp. 633 (E.D. Va. 1975) 4, 7
Chandler v. Roudebush, 425 U.S. 840 (1976) 11
Charles River Park "A", Inc. v. HUD, 519 F.2d 935 (D.C. Cir. 1975) 4, 8
Chrysler Corp. v. Schlesinger, 412 F.Supp. 171, 176 (D. Del. 1976) 9, 16
Continental Oil Co. v. FPC, 519 F.2d 31 (5th Cir. 1975) 4
Crown Central Petroleum Corp. v. Kleppe, 424 F.Supp. 744 (D. Md. 1976) 4
EPA v. Mink, 410 U.S. 73, 80 (1973) 14
Exxon v. Governor of Maryland, No. 77-10 2
FAA v. Robertson, 422 U.S. 255, 262 (1975) 14, 16
First National Bank of Boston v. Belotti, No. 76-1172 2
Garrett Corp. v. McLucas, C.A. No. 76-0260 (D.D.C., filed Feb. 17, 1976) 4
General Dynamics Corp. v. Dunlop, 427 F.Supp. 578 (E.D. Mo. 1976), *appeal pending*, No. 77-1192 (8th Cir.) 4, 7

Cases, continued: Page

Goodyear Tire & Rubber Co. v. Dunlop, C.A. No. 75-1828 (D.D.C. Dec. 9, 1975) 4

Government Sales Consultants, Inc. v. GSA, C.A. No. 77-1294 (D.D.C., filed Aug. 24, 1977) 4

GTE Sylvania Inc. v. Consumer Prod. Safety Comm'n, 404 F.Supp. 352 (D. Del. 1975) 4

Gulf Oil Corp. v. Brennan, C.A. No. 72-F-4 (D. Colo., filed Jan. 2, 1974) 5

Honeywell Information Systems, Inc. v. NASA, C.A. No. 76-353 (D.D.C. Jul. 28, 1976), *appeal dismissed*, No. 76-1977 (D.C. Cir. May 6, 1977) 4, 8

Hughes Aircraft Co. v. Schlesinger, 384 F.Supp. 292 (C.D. Cal. 1974), *appeal pending*, No. 75-1064 (9th Cir.) 5

International Eng'r Co. v. Richardson, 512 F.2d 573 (D.C. Cir. 1975) 4

Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470 (1970) 2, 8, 13

Lawyers' Coop. Publishing Co. v. Schlesinger, C.A. No. 1974-212 (W.D. N.Y. Apr. 22, 1975) 4

Leeds & Northrop Co. v. ERDA, C.A. No. 77-1047 (D.D.C., filed Jun. 11, 1977) 4

Malone v. White Motor Corp., No. 76-1184 2

McCoy v. Weinberger, 386 F.Supp. 504 (W.D. Ky. 1974) 5, 7

Metropolitan Life Ins. Co. v. Usery, 426 F.Supp. 150 (D.D.C. 1976), *cert. denied sub nom. Prudential Ins. Co. v. National Organization for Women*, ___ U.S. ___, 53 L.Ed.2d 238 (1977) 4, 7, 16

Military Audit Project v. Kettles, C.A. No. 7566 (D.D.C. May 17, 1976) 4

National Parks and Conservation Ass'n v. Kleppe, 547 F.2d 673, 676 n. 11 (D.C. Cir. 1976) 7, 9, 16

Cases, continued: Page

National Parks and Conservation Ass'n v. Morton, 498 F.2d 765, 767-70 (1974) 13

Neal-Cooper Grain Co. v. Kissinger, 385 F.Supp. 769 (D.D.C. 1974) 5

Olin Corp. v. Schlesinger, C.A. No. 75-0206 (E.D. Va., filed Apr. 30, 1975) 4

Open America v. Watergate Special Prosecution Force, 547 F.2d 605, 612, 617 (D.C. Cir. 1976) 5

Pacific Architects and Engineers, Inc. v. Renegotiation Board, 505 F.2d 383, 385 (D.C. Cir. 1974) 9

Parke Town v. Hud, C.A. No. 75-1344 (E.D. Pa., filed May 13, 1975) 4

Pennzoil Co. v. FPC, 534 F.2d 627 (5th Cir. 1976) 4, 7

Pharmaceutical Mfrs. Ass'n v. Weinberger, 401 F.Supp. 444 (D.D.C. 1975) 4

Pharmaceutical Mfrs. Ass'n v. Weinberger, 411 F.Supp. 576 (D.D.C. 1976) 4

Planning Research Corp. v. FPC, 555 F.2d 970 (D.C. Cir. 1977) 4, 7

Prudential Ins. Co. v. HEW, C.A. No. 75-1773 (E.D. Pa., filed Jun. 23, 1975) 4

Sears, Roebuck and Co. v. Eckerd, No. 76C-244 (N.D. Ill. Aug. 6, 1976) 4

Sears, Roebuck and Co. v. GSA, 553 F.2d 1378 (D.C. Cir.), *cert. denied*, ___ U.S. ___ (1977) 4

Sears, Roebuck and Co. v. GSA, 384 F.Supp. 996 (D.D.C.), *stay dissolved*, 509 F.2d 527 (D.C. Cir. 1974), *decision on remand*, 402 F.Supp. 376 (D.D.C. 1975), rev'd, 553 F.2d 1378 (D.C. Cir. 1977) 5, 8

Singer Co. v. Schlesinger, C.A. No. 3-75-1152 (N.D. Tex., filed May 20, 1975) 5

Cases, continued: Page

Sybion v. Kleppe, No. 76-492 (W.D. N.Y., filed Nov. 1, 1976) 4

Union Carbide Corp. v. Ray, C.A. No. 74-941 (D. Md., filed Sept. 5, 1974) 5

Union Oil Co. v. FPC, 519 F.2d 31 (5th Cir. 1975) 4

United States Steel Corp. v. Schlesinger, 8 Fair Empl. Prac. Cas 923 (E.D. Va. 1974), *aff'd sub nom. Westinghouse Electric Corp. v. Schlesinger*, 542 F.2d 1190 (4th Cir. 1976), *cert. denied sub nom. Brown v. Westinghouse Electric, Corp.*, __ U.S. __, 53 L.Ed.2d 239 (1977) 5

USS-OCF-W&M v. Eckerd, C.A. No. 76-1933 (D.D.C. Dec. 9, 1976) 4, 6

Vistron Corp. v. Andrus, No. 77-85-A (E.D. Va. Feb. 23, 1977) 4

Waterman Heights Nursing Home, Inc. v. Weinberger, C.A. No. 75-0063 (D. R.I., filed May 3, 1975) 5

Western Union v. Marshall, No. 77-659 2

Westinghouse Elec. Corp. v. Schlesinger, 542 F.2d 1190 (4th Cir. 1976), *cert. denied sub nom. Brown v. Westinghouse Elec. Corp.*, __ U.S. __, 53 L.Ed.2d 239 (1977) 7, 8, 15

Westinghouse Elec. Corp. v. Schlesinger, 392 F.Supp. 1246, 1249-52 (E.D. Va. 1974), *aff'd* 542 F.2d 1190 (4th Cir. 1976) 4, 16

Westinghouse Elec. Corp. v. United States Nuclear Regulatory Comm'n, 555 F.2d 82 (3d Cir. 1977) 3

Page

Statutes:

18 U.S.C. §1905 3

Freedom of Information Act:

5 U.S.C. §552 (Supp. V 1975) 3
5 U.S.C. §552(b)(4) 6
5 U.S.C. §552(a)(4)(B) 8
5 U.S.C. §552(a)(6)(A)(i) 10
5 U.S.C. §552(a)(4)(E) 10
5 U.S.C. §552(a)(4)(F) 10
5 U.S.C. §552(a)(4)(G) 10
5 U.S.C. §552(b)(1), (2), (5) and (7) 15

1974 Amendments of the Freedom of Information Act, Act of November 21, 1974, Pub. L. 93-502, 88 Stat. 1561 5

Civil Rights Act of 1964, Title VII, 78 Stat. 253, as amended, 42 U.S.C. §2000(e), *et seq.*; Equal Employment Opportunity Act of 1972, Pub. L. 92-261, 86 Stat. 103 . . . . . 11, 12

Legislative Materials:

S. Rep. No. 93-854, 93rd Cong. 2d Sess. 1 (1974) 10

H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966) 12

S. Rep. No. 813, 89th Cong., 1st Sess. 5, 9 (1965) 12, 15

Hearings on S. 1666 before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 88th Cong., 1st Sess. 1974, 199 (1964) 8, 12, 13

Miscellaneous:

Arnold, *Who's Going Fishing in Government Files*, 6 Juris Doctor 17 (1976) 5

Page

Miscellaneous, continued:

Clement, *The Rights of Submitters to Prevent Agency Disclosure of Confidential Business Information: The Reverse Freedom of Information Act Lawsuit*, 555 Tex L. Rev. 587 (1977) 5, 10

Drachsler, *The Freedom of Information Act and the "Right" of Non-Disclosure*, 28 Ad. L. Rev. (1976) 5

Kuersteiner and Herbach, *The FOIA: An Examination of the Commercial or Financial Exemption*, 16 Santa Clara L. Rev. 193 (1976) 6

O'Reilly, *Government Disclosure of Private Secrets Under the Freedom of Information Act*, 30 Bus. Lawyer 1125 (1975) 6, 11, 15

Patten and Weinstein, *Disclosure of Business Secrets Under the Freedom of Information Act: Suggested Limitations*, 29 Ad. L. Rev. 193 (1977) 6, 11, 15

Wallace, *Proper Disclosure and Indecent Exposure: Protection of Trade Secrets and Confidential Commercial Information Supplied to the Government*, 34 Fed. B.J. 295 6

A Review of the Fourth Exemption of the FOIA, 9 Akron L. Rev. 673 (1976) 6, 15

Freedom of Information: Too Much of a Good Thing? 662 Fed. Cont. Rep. K-1 (Dec. 27, 1976) 6

Government Information and the Rights of Citizens, 73 Mich. L. Rev. 971 (1975) 6

Protection From Government Disclosure – The Reverse-FOIA Suit, 1976 Duke L.J. 330 (1976) 6, 11

Public Disclosure of Confidential Business Information Under the Freedom of Information Act: Toward a More Objective Standard, 60 Cornell L. Rev. 109 (1974) 6

Miscellaneous, continued: Page

Reverse Freedom of Information Act Suits: Confidential Information in Search of Protection, 70 Nw. U.L. Rev. 995 (1976) 6, 11

The Freedom of Information Act – A Tool of Industry?, Sacramento Bee, Jan. 1, 1978 ..... 3, 5, 6, 8

Use, Abuse of the Freedom of Information Act, Washington Post, July 27, 1976 ..... 6, 8

Would Macy's Tell Gimbels: Government Controlled Business Information and the Freedom of Information Act, Forwards and Backwards, 6 Loy. Chi. L.J. 594 (1975) 6

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-922

CHRYSLER CORPORATION,

Petitioner,

v.

HAROLD BROWN, *et al.*,

Respondents.

BRIEF *AMICUS CURIAE* ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES

This brief *amicus curiae* is filed on behalf of the Chamber of Commerce of the United States with the written consent of the petitioner and respondents, as appears in Appendix A herein.

INTEREST OF THE AMICUS CURIAE

The Chamber of Commerce of the United States is the largest business federation in the United States, with a total membership in excess of 69,000 enterprises and organizations representing businessmen and women

throughout the United States. More than 3,700 state and local chambers of commerce and trade associations are members.

The Chamber represents its members in a broad spectrum of matters of critical importance to the business community, including participation as an *amicus curiae* in cases before this Court.[1]

The instant case is of vital concern to the large number of Chamber members who have submitted—and continue to submit—to Federal agencies confidential business information which may be subject to disclosure under the Freedom of Information Act. As more fully set forth herein, at stake in this case is the ability of American business to protect adequately business data and trade secrets tendered in confidence to governmental entities from both foreign and domestic competitors.

In addition, the Chamber and its members are concerned that a judicial determination which impairs the ability of the owners of such information to assert affirmatively and vigorously their proprietary interests will ultimately result in a reluctance on the part of business to cooperate voluntarily with government

---

[1] *E.g.*, Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470 (1974) (disclosure of trade secrets); Exxon v. Governor of Maryland, No. 77-10 (impact of State divesture statute on interstate commerce); First National Bank of Boston v. Bellotti, No. 76-1172 (corporate First Amendment speech); Western Union v. Marshall, No. 77-659 (application of overtime provisions of Fair Labor Standards Act to managerial employees during a strike); Malone v. White Motor Corp., No. 76-1184 (preemption of state law by National Labor Relations Act).

agencies in the collection of data necessary to the performance of the agencies' statutory missions.

REASONS FOR GRANTING THE WRIT

The decision of the Third Circuit Court of Appeals in *Chrysler Corporation v. Schlesinger*[2] threatens American industry with unprecedented disclosure of privately owned business secrets by federal officials acting under the Freedom of Information Act ("FOIA").[3] This Court has not addressed the conflicting judicial interpretations[4] which have arisen over the right to prevent governmental disclosure of private business records, particularly to competitors. The recent proliferation of "reverse" FOIA actions by companies seeking to preclude federal release of confidential business data,[5] the increasing public use of the FOIA,[6]

---

[2] Citations to the opinion of the Court of Appeals in this brief are to the appropriate pages of Appendix A in the Petition for Writ of Certiorari.

[3] 5 U.S.C. §552 (Supp. V 1975).

[4] The courts have disagreed upon whether the FOIA and other statutes (*e.g.*, 18 U.S.C. §1905) provide a right to prevent agency release of private records; the extent to which the owner of the records may obtain a *de novo* judicial determination of entitlement to confidentiality; and whether agency officials may, in their discretion, release confidential records found to be exempt from FOIA disclosure requirements. *See* notes 13, 17, 29 and 35 *infra*, and related text.

[5] A Justice Department official has recently reported that 102 reverse FOIA cases are pending in the courts. *The Freedom of Information Act - A Tool of Industry?*, Sacramento Bee, Jan. 1, 1978 at A3. A partial listing of actions contesting disclosure of business records includes: Westinghouse Electric Corp. v. United States Nuclear Regulatory Comm'n, 555 F.2d 82 (3d Cir. 1977);

[footnote continued]

and the widespread attention the reverse FOIA

Planning Research Corp. v. FPC, 555 F.2d 970 (D.C. Cir. 1977); Sears, Roebuck and Co. v. GSA, 553 F.2d 1378 (D.C. Cir.), *cert. denied* ____ U.S. ____ (1977); Westinghouse Elec. Corp. v. Schlesinger, 542 F.2d 1190 (4th Cir. 1976), *cert. denied sub nom.* Brown v. Westinghouse Elec. Corp., ____ U.S. ____, 53 L.Ed.2d 239 (1977); Pennzoil Co. v. FPC, 534 F.2d 627 (5th Cir. 1976); Charles River Park "A", Inc. v. HUD, 519 F.2d 935 (D.C. Cir. 1975); Continental Oil Co. v. FPC, 519 F.2d 31 (5th Cir. 1975); International Eng'r Co. v. Richardson, 512 F.2d 573 (D.C. Cir. 1975); Union Oil Co. v. FPC, 519 F.2d 31 (5th Cir. 1975); Government Sales Consultants, Inc. v. GSA, C.A. No. 77-1294 (D.D.C., filed Aug. 24, 1977); Leeds & Northrop Co. v. ERDA, C.A. No. 77-1047 (D.D.C., filed June 11, 1977); Vistron Corp. v. Andrus, No. 77-85-A (E.D. Va. Feb. 23, 1977); Associated Dry Goods Corp. v. EEOC, 419 F. Supp. 814 (E.D. Va. 1976); Babcock & Wilcox Co. v. Rumsfeld, 70 F.R.D. 595 (N.D. Ohio 1976); Crown Central Petroleum Corp. v. Kleppe, 424 F. Supp. 744 (D. Md. 1976); Garrett Corp. v. McLucas, C.A. No. 76-0260 (D.D.C., filed Feb. 17, 1976); General Dynamics Corp. v. Dunlop, 427 F. Supp. 578 (E.D. Mo. 1976), *appeal pending*, No. 77-1192 (8th Cir.); Honeywell Information Systems, Inc. v. NASA, C.A. No. 76-353 (D.D.C. Jul. 28, 1976), *appeal dismissed*, No. 76-1977 (D.C. Cir. May 6, 1977); Metropolitan Life Ins. Co. v. Usery, 426 F. Supp. 150 (D.D.C. 1976), *cert. denied sub nom.* Prudential Ins. Co. v. National Organization for Women, ____ U.S. ____, 53 L.Ed.2d 238 (1977); Military Audit Project v. Kettles, C.A. No. 7566 (D.D.C. May 17, 1976); Pharmaceutical Mfrs. Ass'n v. Weinberger, 411 F. Supp. 576 (D.D.C. 1976); Sears, Roebuck and Co. v. Eckerd, No. 76C-244 (N.D. Ill. Aug. 6, 1976); Sybion v. Kleppe, No. 76-492 (W.D. N.Y., filed Nov. 1, 1976); USS-OCF-W&M v. Eckerd, C.A. No. 76-1933 (D.D.C. Dec. 9, 1976); Burroughs Corp. v. Schlesinger, 403 F. Supp. 633 (E.D. Va. 1975); Parke Town v. HUD, C.A. No. 75-1344 (E.D. Pa., filed May 13, 1975); Goodyear Tire & Rubber Co. v. Dunlop, C.A. No. 75-1828 (D.D.C. Dec. 9, 1975); GTE Sylvania Inc. v. Consumer Prod. Safety Comm'n, 404 F. Supp. 352 (D. Del. 1975); Lawyers' Coop. Publishing Co. v. Schlesinger, C.A. No. 1974-212 (W.D. N.Y. Apr. 22, 1975); Olin Corp. v. Schlesinger, C.A. No. 75-0206 (E.D. Va., filed Apr. 30, 1975); Pharmaceutical Mfrs. Ass'n v. Weinberger, 401 F. Supp. 444 (D.D.C. 1975); Prudential Ins. Co. v. HEW, C.A. No.

[footnote continued]

phenomenon has received,[7] attest to the importance of the interests at stake in this case and the need for clarification of the law which only this Court can provide.

75-1773 (E.D. Pa., filed June 23, 1975); Singer Co. v. Schlesinger, C.A. No. 3-75-1152 (N.D. Tex., filed May 20, 1975); Waterman Heights Nursing Home, Inc. v. Weinberger, C.A. No. 75-0063 (D.R.I., filed May 3, 1975); Gulf Oil Corp. v. Brennan, C.A. No. 72-F-4 (D. Colo., filed Jan. 2, 1974); Hughes Aircraft Co. v. Schlesinger, 384 F. Supp. 292 (C.D. Cal. 1974), *appeal pending*, No. 75-1064 (9th Cir.); McCoy v. Weinberger, 386 F. Supp. 504 (W.D. Ky. 1974); Neal-Cooper Grain Co. v. Kissinger, 385 F. Supp. 769 (D.D.C. 1974); Sears, Roebuck and Co. v. GSA, 384 F. Supp. 996 (D.D.C.), *stay dissolved*, 509 F.2d 527 (D.C. Cir. 1974), *decision on remand*, 402 F. Supp. 378 (D.D.C. 1975), *rev'd*, 553 F.2d 1378 (D.C. Cir. 1977); Union Carbide Corp. v. Ray, C.A. No. 74-941 (D. Md., filed Sept. 5, 1974); United States Steel Corp. v. Schlesinger, 8 Fair Empl. Prac. Cas. 923 (E.D. Va. 1974), *aff'd sub nom.* Westinghouse Electric Corp. v. Schlesinger, 542 F.2d 1190 (4th Cir. 1976), *cert. denied sub nom.* Brown v. Westinghouse Electric Corp., ____ U.S. ____, 53 L.Ed.2d 239 (1977).

[6]The 1974 amendments of the FOIA, Act of November 21, 1974, Pub. L. No. 93-502, 88 Stat. 1561, achieved their intended purpose of facilitating use of the disclosure statute. For example, the FBI received 447 FOIA requests in 1974; the number increased to 13,875 in 1975 and approximately 17,000 in 1977. During the same period the FBI's cost of implementing the statute rose from $160,000 to $9.1 million. The Department of Justice handled 100 FOIA appeals the year preceding the 1974 amendments and 1,276 the following year. *See* Open America v. Watergate Special Prosecution Force, 547 F.2d 605, 612, 617 (D.C. Cir. 1976); *The Freedom of Information Act - A Tool of Industry?*, Sacramento Bee, Jan. 1, 1978, at A-3.

[7]*See, e.g.*, Arnold, *Who's Going Fishing in Government Files*, 6 Juris Doctor 17 (1976); Clement, *The Rights of Submitters to Prevent Agency Disclosure of Confidential Business Information: The Reverse Freedom of Information Act Lawsuit*, 55 Texas L. Rev. 587 (1977); Drachsler, *The Freedom of Information Act and the "Right" of Non-Disclosure*, 28 Ad. L. Rev. (1976);

[footnote continued]

The conflicting decisions in reverse FOIA cases stem from the failure of the Act to provide an explicit mechanism for protecting private business records in government files. FOIA Exemption 4[8] declares that trade secrets and confidential commercial or financial information[9] are not subject to the FOIA disclosure

Kuersteiner and Herbach, *The FOIA: An Examination of the Commercial or Financial Exemption*, 16 Santa Clara L. Rev. 193 (1976); O'Reilly, *Government Disclosure of Private Secrets Under the Freedom of Information Act*, 30 Bus. Lawyer 1125 (1975); Patten and Weinstein, *Disclosure of Business Secrets Under the Freedom of Information Act: Suggested Limitations*, 29 Ad. L. Rev. 193 (1977); Wallace, *Proper Disclosure and Indecent Exposure: Protection of Trade Secrets and Confidential Commercial Information Supplied to the Government*, 34 Fed. B.J. 295; Note, *Reverse Freedom of Information Act Suits: Confidential Information in Search of Protection*, 70 Nw. U.L. Rev. 995 (1976); Note, *A Review of the Fourth Exemption of the FOIA*, 9 Akron L. Rev. 673 (1976); Note, *Protection From Government Disclosure - The Reverse-FOIA Suit*, 1976 Duke L.J. 330 (1976); Note, *Public Disclosure of Confidential Business Information Under the Freedom of Information Act: Toward a More Objective Standard*, 60 Cornell L. Rev. 109 (1974); Note, *Would Macy's Tell Gimbels: Government Controlled Business Information and the Freedom of Information Act, Forwards and Backwards*, 6 Loy. Chi. L.J. 594 (1975). *See also* Project, *Government Information and the Rights of Citizens*, 73 Mich. L. Rev. 971 (1975); *Freedom of Information: Too Much of a Good Thing?*, 662 Fed. Cont. Rep. K-1 (Dec. 27, 1976); *The Freedom of Information Act - A Tool of Industry?*, Sacramento Bee, Jan. 1, 1978 at A-3; *Use, Abuse of the Freedom of Information Act*, Washington Post, July 27, 1976, at A-4.

[8] 5. U.S.C. §552(b)(4).

[9] The nature of the information in issue in Exemption 4 cases has included such classes of records as:

(1) technical and financial data contained in government contracts and competitive proposals [*e.g.*, design data and engineering drawings for building components contained in a successful government contract proposal (USS-OCF-W&M v.

[footnote continued]

requirements. The Act, however, is essentially concerned with promoting disclosure and does not state how Exemption 4's protection is to be achieved. This question has precipitated substantial judicial disagreement to the point where some courts, represented in the extreme by the Third Circuit decision in *Chrysler*, have effectively precluded a company which disagrees with a governmental decision to disclose its business secrets from obtaining the protection Congress intended Exemption 4 to provide.[10] Unless the split among the circuit courts is repaired, *Chrysler v. Schlesinger* and

Eckerd, *supra* note 5, slip op. at 2); a 1,200 page technical methodology for development of a computer based regulatory information system contained in a successful proposal for a government contract (Planning Research Corp. v. FPC, 555 F.2d 970, 971 (D.C. Cir. 1970); costs, prices, profits and cash flow provisions in a sub-contract under a government contract for nuclear powered propulsion systems (Babcock & Wilcox Co. v. Rumsfeld, *supra* note 5, 70 F.R.D. at 598); prices and discounts for components for a computer data processing system contained in an unsuccessful proposal for a government contract (Burroughs Corp. v. Schlesinger, *supra* note 5, 403 F. Supp. at 637)];

(2) employment data [*e.g.*, work force analyses, manning tables, and projected promotions data in affirmative action plans and EEO-1 forms (Westinghouse Elec. Corp. v. Schlesinger, *supra* note 5, 542 F.2d at 1195; Metropolitan Life Ins. Co. v. Usery, *supra* note 5, slip op. at 12; General Dynamics Corp. v. Dunlop, *supra* note 5, slip op. at 5)];

(3) financial reports [*e.g.*, data disclosing income, taxes, deductions, earnings, profits, net worth, cost breakdowns and salaries (National Parks and Conservation Ass'n v. Kleppe, 547 F.2d 673, 676 n. 11 (D.C. Cir. 1976); McCoy v. Weinberger, *supra* note 5, 386 F. Supp. at 505)]; and

(4) reserve data [*e.g.*, raw data relevant to reserve estimates for natural gas wells (Pennzoil Co. v. FPC, *supra* note 5, 534 F.2d at 627)].

[10] *See* arguments I and II *infra*.

similar decisions can be expected to accelerate the reported misuse of FOIA for discovery of competitors' business secrets[11] and the resulting impairment of fair commercial competition and subversion of the free enterprise system.[12]

I.

THE THIRD CIRCUIT ERRED IN DENYING THE OWNER OF BUSINESS RECORDS THE OPPORTUNITY TO PROVE THEY ARE EXEMPT FROM PUBLIC DISCLOSURE.

Prior to *Chrysler,* the Fourth and District of Columbia Circuits had ruled that a judicial determination as to whether business records were within FOIA Exemption 4 was to be made *de novo.*[13] The

---

[11] *See, e.g.,* Honeywell Information Systems v. NASA, *supra* note 5, slip op. at 8 n. 8 ("The problems posed by companies using the Freedom of Information Act to conduct 'industrial espionage' remain troublesome."); *The Freedom of Information Act - A Tool of Industry, supra* note 7; *Use, Abuse of the Freedom of Information Act, supra* note 7.

[12] *See, e.g.,* Hearings on FOIA Bill S. 1666 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, 88th Cong., 1st Sess. 199 (1964) ("[N]ot only as a matter of fairness, but as a matter of right, and as a matter basic to our free enterprise system, private business information should be afforded appropriate protection, at least from competitors."). *Cf.* Kewanee Oil. Co. v. Bicron Corp., 416 U.S. 470, 481 (1974).

[13] *See* Sears, Roebuck and Co. v. GSA, 553 F.2d 1378, 1381 (D.C. Cir. 1977) ("The review standard of the FOIA in a suit to compel disclosure is also the appropriate standard in the reverse FOIA case."); Charles River Park "A", Inc. v. HUD, *supra* note 5, 519 F.2d at 940 n. 4; Westinghouse Elec. Corp. v. Schlesinger, *supra* note 5, 542 F.2d at 1214-15. The FOIA expressly requires *de novo* consideration of whether records are within an exemption in an action brought to compel disclosure. 5 U.S.C. §552(a)(4)(B).

determination was to be *de novo* regardless of whether the issue was raised by a requester in an FOIA action to compel disclosure of the records, or by a company seeking to prevent disclosure in a reverse FOIA action.[14] In both direct and reverse actions under Exemption 4, the courts have required the proponent of confidentiality to adduce "specific factual or evidentiary material" establishing the confidential nature and competitive value of the records.[15]

In line with the practice of these courts, the District Court in the instant case held an evidentiary hearing in which Chrysler was permitted to prove the confidential nature of the data in issue. On the basis of Chrysler's proof, the District Court issued detailed factual findings concluding that Chrysler could be harmed competitively by disclosure of portions of the data, and these data were thus within Exemption 4.[16] The Third Circuit reversed. It held, in effect, that while a company requesting release of Chrysler's data would be entitled to a *de novo* determination of their confidentiality, Chrysler was not. Chrysler's reverse action was confined to review of the administrative record, and the presentation of evidence to the District Court to prove the confidentiality of the data was held to be in

---

[14] *Id.*

[15] *See* National Parks and Conservation Ass'n v. Kleppe, 555 F.2d 673, 679 (D.C. Cir. 1976). Mere "conclusory opinions" as to confidentiality have been held to be insufficient to achieve the FOIA's purpose of promoting the fullest responsible disclosure. *Id. See also* Pacific Architects and Engineers, Inc. v. Renegotiation Board, 505 F.2d 383, 385 (D.C. Cir. 1974).

[16] Chrysler Corp. v. Schlesinger, 412 F. Supp. 171, 176 (D. Del. 1976).

error.[17] Because the FOIA itself inherently precludes proper administrative consideration of the applicability of Exemption 4 to private commercial records, the Third Circuit's ruling leaves businesses with virtually no opportunity to prove their records are deserving of the protection Congress intended Exemption 4 to provide.

To facilitate "freer and more expeditious public access to government information,"[18] Congress amended the FOIA in 1974[19] *requiring agency determinations of releasibility to be made within ten days after receipt of a request.*[20] This ten day limitation on the time for agency decision virtually precludes an effective administrative assessment of the justification for confidentiality of business records under Exemption 4. The agency cannot, within this brief time, provide the owner of the records, the only party with both the incentive and detailed knowledge necessary to defend the records' proprietary nature, an effective opportunity to prepare and present evidence.[21] Nor can the agency

---

[17]App. A at 38a-39a.

[18]S. Rep. No. 93-854, 93rd Cong., 2nd Sess. 1 (1974).

[19]*See* note 6, *supra.*

[20]5 U.S.C. §552(a)(6)(A)(i). Other provisions of the 1974 Act also encourage disclosure. *See, e.g.,* 5 U.S.C. §552(a)(4)(E) (Attorney's fees and litigation costs may be assessed against agencies if the complainant substantially prevails); 5 U.S.C. §552(a)(4)(F) (agency employees who arbitrarily withhold records may be subject to Civil Service Commission disciplinary action; 5 U.S.C. §552(a)(4)(G) (agency employees failing to comply with Court order may be punished for contempt).

[21]*See Clement, supra* note 7, 55 Tex. L. Rev. at 635 ("Ten days is clearly insufficient to complete the lengthy process of notification of submitters, preparation of arguments by sub-

[footnote continued]

itself effectively assess the need for confidential treatment, for it has neither the time, the real stake in the outcome (as it would if government records were requested), nor the factual knowledge and expertise required for a competent evaluation.[22] And agency officials always face the threat of disciplinary action and other sanctions for improper refusal to disclose the requested records.[23] Thus the "administrative record" upon which the Third Circuit requires a company to rely for its sole protection is inherently incapable of competently addressing the need for confidential treatment.

The conclusion of the Fourth and District of Columbia Circuits that Exemption 4 can be properly implemented only when the same *de novo* consideration applicable to the direct FOIA suit also is applied in the reverse FOIA action,[24] is directly supported by this Court's decision in *Chandler v. Roudebush,* 425 U.S. 840 (1976). The issue presented in *Chandler* was whether the Equal Employment Opportunity Act of 1972[25] gave federal employees the same right to a trial

---

mitters, and consideration of these arguments by agencies."; Note, *supra* note 7, 1976 Duke L. J. at 361 ("The Act neither makes provisions, nor allows sufficient time, for notification of the party who has submitted the information to the agency of a decision to release the documents").

[22]*Id;* Westinghouse Elec. Corp. v. Schlesinger, *supra* note 5, 542 F.2d at 1212-13; Note, *supra* note 7, 70 Nw. U.L. Rev. at 998-99; O'Reilly, *supra* note 7, 30 Bus. L. at 1134, 1146; Patton, *supra* note 7, 29 Ad. L. Rev. at 202.

[23]*See* note 20, *supra.*

[24]*See* note 13 *supra.*

[25]Pub. L. 92-261, 86 Stat. 103.

de novo of employment discrimination claims as "private-sector" employees enjoyed under Title VII of the Civil Rights Act of 1964.[26] Although the 1972 Act did not expressly provide *de novo* consideration, the Court held that the relevant statutory language and legislative history revealed a congressional purpose to give federal employees the same form of civil action granted to private sector employees, which encompassed a trial *de novo*.

The FOIA similarly contains an express requirement for *de novo* consideration of the issue of confidentiality under Exemption 4 in a civil action to compel disclosure. The clear legislative intent to effect protection for confidential business records against disclosure to competitors[27] squarely supports the

---

[26]78 Stat. 253, as amended 42 U.S.C. §2000(e) et seq. (Supp. V 1975).

[27]Congress intended Exemption 4 to "assure the confidentiality" of business information which "would not customarily be made public by the person from whom it was obtained by the Government." H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966), 1966 U.S. Code Cong. & Ad. News 2418, 2427. *See also* S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965).

The legislative history of Exemption 4 discloses that its purpose was to remedy the problem that would result if private business information were to become available to competitors through governmental disclosure. *See, e.g.*, the comments of a Treasury Department official during the Senate Hearings on the FOIA bill:

> We can see no reason for changing the ground rules of American business so that any person can force the Government to reveal information which relates to the business activities of a competitor.

Hearings on S. 1666 before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary,

[footnote continued]

decisions of the Fourth and District of Columbia Circuits to extend the right to a *de novo* determination to reverse FOIA actions as well.[28] The Third Circuit's denial of this fundamental right should be redressed by this Court.

II.

BUSINESS SECRETS ADMITTEDLY WITHIN EXEMPTION 4 SHOULD NOT BE DISCLOSABLE AT THE DISCRETION OF AGENCY OFFICIALS.

The Third Circuit's decision bestows upon federal officials the authority to disclose in their discretion business records which are acknowledged to be within Exemption 4.[29] Even if Respondents were to find, as

---

88th Cong., 1st Sess. 174 (1964). Similarly the comments of a Justice Department official on the bill provide:

> A second problem area lies in the large body of Government information involving private business data and trade secrets, the disclosure of which could severely damage individual enterprise and cause widespread disruption of the channels of commerce. . . . [T]he greater part of such information is exacted, by statute, in the course of necessary regulatory or governmental functions.
>
> Again, not only as a matter of fairness, but as a matter basic to our free enterprise system, private business information should be afforded appropriate protection, at least from competitors.

Id. at 199. *See also* National Parks and Conservation Ass'n v. Morton, 498 F.2d 765, 767-70 (1974).

Exemption 4 grants "explicit federal protection" to proprietary information provided to federal agencies. Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 494 (1974) (Marshall J., concurring).

[28]*See* note 13 *supra*.

[29]App. A at 38a.

did the District Court, that disclosure of Chrysler's competitively valuable records could harm the Company, they could nevertheless release the data if they find public disclosure to be "desireable."[30] This decision would be reviewable only to determine whether the agency considered the "proper factors."[31]

The reasons why it is inherently infeasible for agency officials, within the ten day decision period prescribed by the FOIA, to intelligently balance a company's interest in the confidentiality of its business secrets against any public interest in disclosure have already been discussed.[32] Although these factors alone compel reversal of the Third Circuit's decision, more fundamentally the Court of Appeals also failed to perceive that Congress, in defining the scope of the FOIA exemptions, has already "balanced" the competing public and private interests.[33] Exemption 4 was drafted to provide a "workable and balanced formula" for determining which records should be publicly available and which are necessary to maintain in confidence.[34] "[T]he Act was intended, to use the language of the Senate report, to set 'up workable standards for what records should and should *not* be open to public

---

[30] *Id.*

[31] *Id.*

[32] *See* discussion at pp. 10-11 *supra*.

[33] *See* FAA v. Robertson, 422 U.S. 255, 262 (1975).

[34] *Id. See also* EPA v. Mink, 410 U.S. 73, 80 (1973) (The Act attempts to "provid[e] a workable formula which encompasses, balances, and protects all interests. . . .").

inspection'."[35] Balancing of interests by agency officials is thus inappropriate since Exemption 4 describes types of records for which Congress has determined that the interest in confidentiality presumptively outweighs that in disclosure.

Several of the other nine FOIA exemptions were adopted for the protection of *governmental interests* in confidentiality.[36] Where data protected by these exemptions is in issue, an agency appropriately may waive the governmental interest and disclose such documents even though they may be exempt. But Exemption 4 plainly protects the *private interest* of businesses in the confidentiality of their records. It was erroneous for the Court of Appeals to give agency officials the discretionary power to waive this private interest in confidentiality, since this would permit administrative nullification of the carefully considered protections that Congress embodied in Exemption 4.[37]

The Third Circuit's decision thus ignores this Court's declaration that the FOIA exemptions already encom-

---

[35] Westinghouse Elec. Corp. v. Schlesinger, *supra* note 5, 542 F.2d at 1211, *citing* S. Rep. No. 813, 89th Cong., 1st Sess. 5 (1965). (Emphasis added by the court.)

[36] *See, e.g.*, FOIA Exemptions 1, 2, 5 and 7, 5 U.S.C. §552(b)(1), (2), (5) and (7).

[37] The critical distinction between the government's right to disclose its own records, even though exempt, and its right to disclose private records, is discussed in Westinghouse Elec. Corp. v. Schlesinger, *supra* note 5, 542 F.2d at 1210; O'Reilly, *supra* note 7, 30 Bus. Lawyer at 1134; Note, *A Review of the Fourth Exemption of the Freedom of Information Act*, *supra* note 7, 9 Akron L. Rev. at 694; Patten, *supra* note 7, 29 Ad. L. Rev. at 202.

pass a proper balancing of the interests involved[38] and dangerously erodes the effectiveness of Exemption 4. Several courts have had occasion to discuss the potential competitive abuses which could result from the governmental disclosure of company records.[39] This Court should not permit the FOIA to become a vehicle for competitive misconduct, in contravention of Congress' clear mandate, at the whim of agency officials.

---

[38] *See* FAA v. Robertson, 422 U.S. 255, 262 (1975).

[39] *See, e.g.*, National Parks and Conservation Association v. Kleppe, 547 F.2d 673, 684 (D.C. Cir. 1976) (Disclosure of company's financial data would provide competitors with valuable insights into the company's operational strengths and weaknesses, facilitating selective pricing, market concentration, expansion plans and possible takeover bids); Metropolitan Life Insurance Company v. Usery, *supra* note 5, slip op. at 14, 24 (Disclosure of work force analyses would increase a company's vulnerability to employee raiding; disclosure of projected promotion data would adversely affect employee productivity and morale); Westinghouse Elec. Corp. v. Schlesinger, 392 F. Supp. 1246, 1249-52 (E.D. Va. 1974) *aff'd* 542 F.2d 1190 (4th Cir. 1976) (Disclosure of plaintiff company's work force analyses could enable a competitor to estimate the company's labor costs, profit margin, unit manufacturing cost, vulnerability to a price change and new product development). *See also* Chrysler Corp. v. Schlesinger, 412 F. Supp. 171, 176 (D. Del. 1976).

CONCLUSION

For the reasons set forth above, the Chamber of Commerce of the United States respectfully requests this Court to grant the Petition for Certiorari.

Respectfully submitted,

ROBERT L. ACKERLY
THOMAS L. PATTEN
KENNETH W. WEINSTEIN

SELLERS, CONNER & CUNEO
1625 K Street, N.W.
Washington, D.C. 20006

LAWRENCE B. KRAUS

CHAMBER OF COMMERCE OF
THE UNITED STATES

STANLEY T. KALECZYC

NATIONAL CHAMBER LITIGATION
CENTER, INC.

Attorneys for the Chamber of Commerce of the United States

APPENDIX

APPENDIX

COLE, ZYLSTRA & RAYWID
ATTORNEYS AT LAW
2011 EYE STREET, N.W.
WASHINGTON, D.C. 20006

December 22, 1977

Thomas L. Patten, Esquire
Sellers, Conner & Cuneo
1625 K Street, N.W.
Washington, D.C. 20006

Re: *Chrysler Corp. v. Brown, et al.*

Dear Mr. Patten:

On behalf of Chrysler Corporation, we hereby consent to your fliing a brief *amicus curiae* on behalf of the Chamber of Commerce of the United States in *Chrysler Corp. v. Brown*. It is my understanding that you intend to support the petition for writ of certiorari.

Very truly yours,

/s/Burt A. Braverman
Burt A. Braverman

OFFICE OF THE SOLICITOR GENERAL
Washington, D.C. 20530

[SEAL]

December 22, 1977

Thomas L. Patten, Esquire
Sellers, Conner & Cuneo
1625 K Street, N.W.
Washington, D.C. 20006

Re: *Chrysler Corporation v. Schlesinger*
(C.A. 3)

Dear Mr. Patten:

I hereby consent to the filing of a brief *amicus curiae* on behalf of the Chamber of Commerce of the United States in the Supreme Court in this case.

Sincerely,

/s/Wade H. McCree, Jr.
WADE H. MCCREE, JR.
Solicitor General

The Appendix which normally appears at this point was sealed by the Court and is therefore unavailable for filming.

Supreme Court, U. S.
FILED
FEB 16 1978
MICHAEL RODAK, JR., CLERK

No. 77-922

In the Supreme Court of the United States

OCTOBER TERM, 1977

CHRYSLER CORPORATION, PETITIONER

v.

HAROLD BROWN, SECRETARY OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS

WADE H. MCCREE, JR.,
Solicitor General,

BARBARA ALLEN BABCOCK,
Assistant Attorney General,

LEONARD SCHAITMAN,
PAUL BLANKENSTEIN,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-922

CHRYSLER CORPORATION, PETITIONER

v.

HAROLD BROWN, SECRETARY OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-42a) is reported at 565 F. 2d 1172. The opinion of the district court (Pet. App. 43a-57a) is reported at 412 F. Supp. 171.

JURISDICTION

The judgment of the court of appeals (Pet. App. 58a-59a) was entered on September 26, 1977. The petition for a writ of certiorari was filed December 27, 1977, the day after a holiday. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether federal agencies may elect by regulation to disclose information that is exempt from mandatory disclosure under the Freedom of Information Act and that is of the character described in 18 U.S.C. 1905.

2. Whether judicial review of an agency's decision to disclose information is limited to review of the administrative record under the Administrative Procedure Act.

STATEMENT

The facts of this case are set forth in detail in the court of appeals' opinion (Pet. App. 1a-20a). Petitioner brought this action in the United States District Court for the District of Delaware, seeking to enjoin respondents[1] from complying with requests under the Freedom of Information Act, 5 U.S.C. 552, for disclosure of certain information that petitioner had furnished to respondents in fulfillment of petitioner's contractual obligations. See Executive Order 11246, 30 Fed. Reg. 12319, as amended by Executive Order 11375, 32 Fed. Reg. 14303; 41 C.F.R. 60-1.4. The information at issue is contained in two affirmative actions plans,[2] which government contractors generally are required to submit to respondents as part of the Executive Order's program of eliminating employment discrimination, and in a compliance review report and a complaint investigation report, which were prepared by the Defense Supply Agency of the Department of Defense in connection with its determination whether petitioner is complying with its obligations under the anti-discrimination program.[3]

---

[1]In addition to the Secretary of Defense, respondents are the Secretary of Labor, the Director of the Office of Federal Contract Compliance Programs, and the Director of the Defense Supply Agency (see note 3, *infra*).

[2]Among other things affirmative action plans include petitioner's annual Employer Information Report, known as an EEO-1 report, which contains data on the number of women and members of minority groups that petitioner employs.

[3]The Secretary of Labor has the responsibility of directing the federal government's equal employment opportunity program with respect to government contractors and has promulgated regulations governing this program. See 41 C.F.R. Part 60. Under these regulations the Secretary has delegated administrative responsibility to the Director of the Office of Federal Contract Compliance Programs (OFCCP). 41 C.F.R. 60-1.2. In turn, the Director has designated various federal agencies as "compliance agencies" and has delegated to each of them primary responsibility for assuring adherence to the equal employment opportunity program by contractors within certain geographical areas or industrial classifications. See 41 C.F.R. 60-1.6. See also OFCCP Compliance Manual § 2-202. In petitioner's case, the Defence Supply Agency of the Department of Defense was the designated compliance agency. (The Defense Supply Agency is now the Defense Logistics Agency.)

The Defense Supply Agency decided to disclose substantial portions of the requested documents.[4] This decision was authorized by regulations promulgated by the Secretary of Labor. 41 C.F.R. Part 60-40 (Pet. App. 62a-65a). The regulations "implement * * * the Freedom of Information Act" (FOIA) and give effect to "the policy of the [Office of Federal Contract Compliance Programs (see note 3, *supra*)] to disclose information to the public and to cooperate with other public agencies as well as private parties seeking to eliminate discrimination in employment." 41 C.F.R. 60-40.1. As a general guideline for the implementation of this policy, the regulations provide that "[u]pon the request of any person * * * records shall be made available for inspection and copying, notwithstanding the applicability of the exemption from mandatory disclosure [under the Freedom of Information Act], if it is determined that the requested inspection or copying furthers the public interest and does not impede any of the functions of the [Office of Federal

---

[4]In general, the portions of the documents the Agency determined not to disclose concerned wage data, or information that might invade the privacy of employees such as salary, personnel records, job applications, promotion analysis, etc.

Contract Compliance Programs] or the Compliance Agencies except in the case of records disclosure of which is prohibited by law." 41 C.F.R. 60-40.2(a).[5]

After a trial at which it heard extensive evidence, the district court found that part of the information the Agency proposed to release was exempted from mandatory disclosure by exemption 4 of the FOIA (Pet. App. 49a-52a). Although it rejected petitioner's argument that exemption 4 prohibited disclosure, the court concluded that release of this information would violate 18 U.S.C. 1905, a criminal statute prohibiting government officials from disclosing certain information "in any manner or to any extent not authorized by law" (Pet. App. 52a-55a). The district court enjoined respondents from disclosing this information but concluded that the remainder of the documents was not protected from public disclosure.

On cross-appeals, the court of appeals explained that it was "in substantial agreement" with respondents (Pet. App. 3a) concerning the general principles and standards that should govern the case. It concluded that the

[5]Under this general guideline, the Secretary of Labor has determined that, on request, EEO-1 reports "which [are] submitted by contractors to the OFCC[P] [or] a compliance agency * * * shall be disclosed." 41 C.F.R. 60-40.4. The Secretary also has determined that affirmative action plans generally "must be disclosed." 41 C.F.R. 60-40.2(b)(1). But the regulations contain exceptions for two specified portions of affirmative action plans (see 41 C.F.R. 60-40.3(a)(1)-60.40.3(a)(2)), which "should be withheld if it is determined that the requested inspection or copying does not further the public interest and might impede the discharge of any of [OFCCP's or the compliance agencies'] functions." 41 C.F.R. 60-40.3(a). Portions of compliance review reports and complaint investigation reports are also subject to withholding under the same standard "during the course of the review to which they pertain or while enforcement action against the contractor is in progress or contemplated within a reasonable time." 41 C.F.R. 60-40.3(a)(5).

exemptions from mandatory disclosure under the FOIA, including exemption 4, permit but do not require federal agencies to refuse disclosure of information covered by the exemptions (Pet. App. 22a-25a), and that the Secretary of Labor's regulations governing disclosure of the information at issue were valid and, if properly applied, authorize disclosure so that 18 U.S.C. 1905 does not apply (Pet. App. 27a-30a).

The court held that it had authority under the Administrative Procedure Act to review the agency's decision to apply the regulation to particular facts, but it concluded that no authority to enjoin disclosure could be inferred from either the FOIA or 18 U.S.C. 1905 (Pet. App. 25a, 30a-31a). Moreover, the court ruled that any review of the administrative decision should be on the basis of the administrative record, not on the basis of testimony or evidence introduced in the district court. If the administrative record is inadequate to permit effective review of the agency decision, the court said, "the remedy is not a trial *de novo*, but a remand to the agency for an additional record or explanation for its decision" (Pet. App. 39a). In this case the court of appeals held that the agency record was not adequate, and accordingly the court remanded the case to the district court for entry of an order that the Defense Supply Agency conduct further proceedings (Pet. App. 39a-40a).

DISCUSSION

We believe that the court of appeals' analysis and disposition of this case is correct. Our petition for a writ of certiorari in *Westinghouse Electric Corp.* v. *Schlesinger*, 542 F. 2d 1190 (C.A. 4), certiorari denied *sub nom. Brown* v. *Westinghouse Electric Corp.*, 431 U.S. 924, took a similar position concerning "reverse FOIA"

suits.[6] In our view: (1) a government agency may elect to disclose information that is exempt from mandatory disclosure under the FOIA and, if it issues appropriate authorizing regulations, it may do so even though the information is of the character described in 18 U.S.C. 1905; and (2) judicial review of an agency's decision to disclose information pursuant to such regulations is authorized by the Administrative Procedure Act, but review should proceed on the basis of the administrative record.

We do not oppose the petition for a writ of certiorari, because we agree with petitioner that this case raises important questions that should be resolved by this Court. Many "reverse FOIA" cases recently have been filed.[7] These cases call into question the purpose of the Freedom of Information Act, its use by private parties to obtain judicial relief against the disclosure of information, and the role of the Executive Branch in discharging the legislative directive, affirmatively expressed in the Act, to permit the "fullest responsible disclosure." S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965).

---

[6]Our petition in *Westinghouse* was submitted to the court of appeals (and served on counsel) in this case, because the position taken in the petition departed somewhat from the position urged in respondents' opening appellate brief (see Pet. App. 3a, 35a). The petition was accompanied by a letter from government counsel stating: "Since the arguments presented in the petition in *Westinghouse Electric Corporation* are applicable to the instant case, we are providing the Court with copies of the petition, and rely on the arguments presented therein to the extent that they may differ from the positions taken in the brief filed with this Court."

[7]In 1976 at least 78 reverse FOIA cases were brought against the government, and in 1977 63 new reverse FOIA cases were filed.

Moreover, the decision of the court of appeals in this case squarely conflicts with *Westinghouse Electric Corp.* v. *Schlesinger, supra*.[8] See also *Charles River Park "A", Inc.* v. *Department of Housing and Urban Development*, 519 F. 2d 935 (C.A. D.C.). Although the Court denied the petition for a writ of certiorari in *Westinghouse*, a conflict now is firmly established and should be resolved.[9] Prompt resolution of these questions will prevent unnecessary litigation in the many pending cases and dispel the uncertainty that prevails.

---

[8]See also *Reynolds Metals Co.* v. *Rumsfeld*, 564 F. 2d 663, 667 n. 8 (C.A. 4).

[9]Petitioner's second question presented—"[w]hether agency regulations promuglated pursuant to 5 U.S.C. §301 constitute 'authorization by iaw' within the meaning of 18 U.S.C. §1905 for disclosure of private, confidential business information" (Pet. 2)—is too narrow. If the Court grants the petition, we would argue that the regulations governing disclosure of the documents at issue are authorized not only by 5 U.S.C. 301 but also by the FOIA and Executive Order 11246. Although the court of appeals held that the regulations were validly promulgated under 5 U.S.C. 301, and therefore did not consider alternative sources of authority, the court stated that its "deferment of these grounds for sustaining the regulations should not be considered an expression of doubt as to these sources of authority, but only of confidence in our * * * §301 holding" (Pet. App. 30a).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

BARBARA ALLEN BABCOCK,
Assistant Attorney General.

LEONARD SCHAITMAN,
PAUL BLANKENSTEIN,
Attorneys.

FEBRUARY 1978.

Supreme Court, U. S.
FILED
JUN 5 1978
MICHAEL RODAK, JR., CLER

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-922

CHRYSLER CORPORATION, *Petitioner,*

v.

HAROLD BROWN, ET AL., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF OF PETITIONER CHRYSLER CORPORATION

BURT A. BRAVERMAN
FRANCES CHETWYND
COLE, ZYLSTRA & RAYWID
2011 Eye Street, N.W.
Washington, D.C. 20006

A. WILLIAM ROLF
P.O. Box 1919
Detroit, Michigan 48288

Attorneys for Petitioner Chrysler Corporation

June 5, 1978

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED	2
STATUTES AND REGULATIONS	2
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	8
ARGUMENT	9
I. Federal Agencies May Not Disclose Private Information Which Falls Within Exemption 4 of the FOIA	12
A. CONGRESS ENACTED EXEMPTION 4 IN ORDER TO "ASSURE" THE PROTECTION OF CONFIDENTIAL COMMERCIAL INFORMATION WHICH IS SUBMITTED TO THE GOVERNMENT BY PRIVATE PARTIES	14
B. THE LOWER COURT'S DECISION UNDERMINES THE PROTECTION OF CONFIDENTIAL BUSINESS INFORMATION WHICH CONGRESS INTENDED EXEMPTION 4 TO PROVIDE	19
C. THE LOWER COURT'S CONSTRUCTION OF EXEMPTION 4 TO PERMIT DISCRETIONARY AGENCY DISCLOSURE OF CONFIDENTIAL COMMERCIAL INFORMATION WILL DISCOURAGE THE FUTURE SUBMISSION OF SUCH INFORMATION TO THE GOVERNMENT	29
D. THIS COURT SHOULD DECLARE THAT FEDERAL AGENCIES DO NOT HAVE DISCRETION TO DISCLOSE TRADE SECRETS AND CONFIDENTIAL COMMERCIAL INFORMATION WHICH FALL WITHIN EXEMPTION 4	33

Page

II. Respondents' Disclosure Regulations Do Not Constitute Authorization by Law, Within the Meaning of 18 U.S.C. § 1905, for Disclosure of Confidential Business Information 39

A. Agency Disclosure Regulations Do Not Constitute Authorization By Law Within the Meaning of 18 U.S.C. § 1905 40

B. Congress Did Not Intend 5 U.S.C. § 301, the FOIA, or Executive Order 11246 to Provide Authority for the Adoption of Agency Regulations Which Would Limit the Applicability of § 1905 47

1. *5 U.S.C. § 301 Does Not Authorize Agency Regulations In Derogation Of 18 U.S.C. § 1905* 48

2. *Neither the FOIA Nor Executive Order 11246 Authorizes the Adoption of Regulations Which Would Limit the Applicability of § 1905* 52

C. 18 U.S.C. § 1905 Constitutes a Specific Statutory Exemption From Disclosure Within the Meaning of FOIA Exemption 3 56

III. A Party Seeking to Enjoin Disclosure of Documents in Violation of 18 U.S.C. § 1905 or FOIA Exemption 4 Is Entitled to a trial *De Novo* 62

A. A Civil Cause of Action Giving Rise to a Trial *De Novo* Should Be Implied Under 18 U.S.C. § 1905 and FOIA Exemption 4 62

B. A Trial *De Novo* on the Applicability of 18 U.S.C. § 1905 and FOIA Exemption 4 is Appropriate Even If Petitioner's Cause of Action Arises Under the APA 69

C. Reverse FOIA Plaintiffs Are Entitled to a Trial *De Novo* in Exemption 4 Cases Because of the Inherent Inadequacy of Agency Fact-finding Procedures Under the FOIA 72

Conclusion 82

Cases: Page

Almota Farmers E. & W. Co. v. *United States*, 409 U.S. 470 24
American Mail Line, Ltd. v. *Gulick*, 411 F.2d 696 14
Babcock & Wilcox Co. v. *Rumsfeld*, 70 F.R.D. 595 50
Barlow v. *Collins*, 397 U.S. 159 71
Bi-Metallic Inv. Co. v. *State Board of Equalization*, 329 U.S. 441 73
Blair v. *Oesterlein Co.*, 275 U.S. 220 46
Blonder-Tongue Labs. v. *University Foundation*, 402 U.S. 313 21
Bristol-Myers Co. v. *FTC*, 424 F.2d 935 ..... 14, 15
Bulova Watch Co. v. *United States*, 365 U.S. 735.... 51, 54
Camp v. *Pitts*, 411 U.S. 138 80
Charles River Park "A", Inc. v. *HUD*, 519 F.2d 935 ..... 50, 69, 70, 71
CIBA-GEIGY Corp. v. *Mathews*, 428 F.Supp. 523.... 33
Citizens To Preserve Overton Park v. *Volpe*, 401 U.S. 402 73
Climax Molybdenum Co. v. *NLRB*, 407 F.Supp. 208... 27
Columbia Packing Co., Inc. v. *U.S. Dept. of Agric.*, 563 F.2d 495 27
Consumers Union, Inc. v. *Cost of Living Council*, 491 F.2d 1396 46
Continental Oil Co. v. *FPC*, 519 F.2d 31 13
Cort v. *Ash*, 422 U.S. 66 64
Dept. of Air Force v. *Rose*, 425 U.S. 352 ..... 35, 75
Dickerson v. *United States Steel Corp.*, 12 E.P.D. § 11095 32
Ditlow v. *Shultz*, 379 F.Supp. 326 20
EPA v. *Mink*, 410 U.S. 73 ..... 28, 35, 36
Epstein v. *Resor*, 421 U.S. 930 14
Exchange National Bank v. *Abramson*, 295 F.Supp. 87 46
FAA Administrator v. *Robertson*, 422 U.S. 255.... 31, 32, 36, 52, 53, 57-61, 63
FCC v. *Schreiber*, 381 U.S. 279 51
General Dynamics v. *Marshall*, 572 F.2d 1211 11
Gifford-Hill, Inc. v. *FTC*, 1975-2 Trade Cases ¶ 60674. 26
Grumman Aircraft Engineering Corp. v. *Renegotiation Board*, 425 F.2d 578 19
Hardin v. *Kentucky Utilities Co.*, 390 US 1 71
Honeywell Information Systems, Inc. v. *NASA*, No. 76-353 (D.D.C.) 23
Hughes Aircraft Co. v. *Schlesinger*, 383 F.Supp. 292.. 70

Page

Illinois Brick Co. v. *Illinois*, 431 U.S. 720 19
Irons v. *Gottschalk*, 548 F.2d 992 58
Isbrandtsen-Mullen Co. v. *United States*, 300 U.S. 139. 51
J. I. Case Co. v. *Borak*, 377 U.S. 426 64
Jondora Music Pub. Co. v. *Melody Recordings, Inc.*, 506 F.2d 392 19
Kewanee Oil Co. v. *Bicron Corp.*, 416 U.S. 470 36
Lanzetta v. *New Jersey*, 306 U.S. 451 58
Lynch v. *Household Finance Corp.*, 405 U.S. 538..... 55
M. A. Schapiro & Co. v. *S.E.C.*, 339 F.Supp. 467..... 20
McCoy v. *Weinberger*, 386 F.Supp. 504 13
Metropolitan Life Ins. Co. v. *Usery*, 426 F.Supp. 150.. 50
National Nutritional Foods Assn. v. *Weinberger*, 512 F.2d 688 53
National Parks and Conservation Assn. v. *Morton*, 498 F.2d 765 ..... 15, 17, 20-21, 29, 63
National Railroad Passengers Corp. v. *National Association of Railroad Passengers*, 414 U.S. 454 65
Neal-Cooper Grain Company v. *Kissinger*, 385 F.Supp. 769 13
NLRB v. *Sears, Roebuck and Co.*, 421 U.S. 132 ..... 26, 28, 32, 36, 37, 54
Norwegian Nitrogen Co. v. *United States*, 288 U.S. 294 51
Pacific Gas & Electric Co. v. *FPC*, 506 F.2d 33 53
Papachristou v. *City of Jacksonville*, 405 U.S. 156 ... 58
Parkridge Hospital v. *Blue Cross and Blue Shield*, 430 F.Supp. 1093 ..... 47, 50
Pleasant Hill Bank v. *United States*, 58 F.R.D. 97 ... 46
Porter v. *Warner Holding Co.*, 328 U.S. 395 63
Posadas v. *National City Bank*, 296 U.S. 497 55
Renegotiation Board v. *Bannercraft Clothing Co.*, 415 U.S. 1 ..... 28, 63
Robertson v. *Butterfield*, 498 F.2d 1031 59
Sanday v. *Carnegie-Mellon University*, 12 FEP Cases 101 32
Schecter v. *Weinberger*, 506 F.2d 1275 59
SDC Development Corp. v. *Mathews*, 542 F.2d 116 .. 37
Sears, Roebuck and Co. v. *Eckerd*, —— F.2d —— 11
Sears, Roebuck and Co. v. *General Services Administration*, 509 F.2d 527 57
Sears, Roebuck and Co. v. *General Services Administration*, 553 F.2d 1378 ..... 56, 61, 69, 70, 78
Seymour v. *Barabba*, 559 F.2d 806 58

Page

Siemens Corp. v. *United States*, Civ.No. 78-0385 (D.D.C.) 26
Sonderegger v. *Department of Interior*, 424 F.Supp. 847 70
Soucie v. *David*, 449 F.2d 1067 29
Sterling Drug, Inc. v. *F.T.C.*, 450 F.2d 698 ..... 19, 39
Thompson v. *Consolidated Gas Utilities Corp.*, 300 U.S. 55 24
Title Guarantee Co. v. *NLRB*, 534 F.2d 484 27
United States v. *Dickey*, 268 U.S. 378 46
United States v. *Price*, 361 U.S. 304 19
United States Steel Corp. v. *Schlesinger*, 8 FEP Cases 923 32
USS-OCF-W&M v. *Eckerd*, No. 76-1933 (D.D.C.) 36
Washington Research Project, Inc. v. *HEW*, 504 F.2d 238 20
Wellford v. *Hardin*, 444 F.2d 21 14
Westinghouse Electric Corp. v. *Nuclear Regulatory Comm.*, 555 F.2d 82 46
Westinghouse Electric Corp. v. *Schlesinger*, 542 F.2d 1190 ..... 13, 15, 22-23, 36, 44, 47, 53, 57, 61, 66, 67, 68, 69, 71, 76, 78, 80
Wilderness Society v. *Morton*, 479 F.2d 842 71
Wyandotte Transportation Company v. *United States*, 389 U.S. 191 ..... 64, 66
Youngstown Sheet and Tube Co. v. *Sawyer*, 343 U.S. 579 55

CONSTITUTION, STATUTES AND REGULATIONS

U.S. Const. art. I, § 8, cl. 8 11
U.S. Const. amend. V 24

Administrative Procedure Act
5 U.S.C. § 301 ..... 7, 39, 40, 47-55
5 U.S.C. § 706 ..... 7, 73
5 U.S.C. § 706(2)(A) 7
5 U.S.C. § 706(2)(F) 73

Federal Aviation Act of 1958
59 U.S.C. § 1504 59

Page

Freedom of Information Act

5 U.S.C. § 552(a)(3) 28, 54
5 U.S.C. § 552(a)(4)(B) 63
5 U.S.C. § 552(a)(4)(E) 80
5 U.S.C. § 552(a)(4)(F) 80
5 U.S.C. § 552(a)(4)(G) 80
5 U.S.C. § 552(a)(6)(A)(i) 74, 80
5 U.S.C. § 552(a)(6)(A)(ii) 80
5 U.S.C. § 552(b)(1) 34, 35
5 U.S.C. § 552(b)(2) 34, 35
5 U.S.C. § 552(b)(3) 6, 9, 35, 40, 56-61
5 U.S.C. § 552(b)(4) ..... *passim*
5 U.S.C. § 552(b)(5) 26, 34, 35
5 U.S.C. § 552(b)(6) 34, 37
5 U.S.C. § 552(b)(7) 26-27, 34
Government In The Sunshine Act, 5 U.S.C. § 552b ... 57
Privacy Act of 1974, 5 U.S.C. § 552a(g)(1) 64
Social Security Act, 42 U.S.C. § 1306 59
13 U.S.C. § 8(b) 38
15 U.S.C. § 176a (1940) 41
15 U.S.C. § 1418(a)(2)(B) 51
18 U.S.C. § 216 (1940) 41
18 U.S.C. § 1905 ..... *passim*
19 U.S.C. § 1335 (1940) 41
28 U.S.C. § 1331(a) 6
29 U.S.C. § 664 51
42 U.S.C. § 263g(d) 51
42 U.S.C. § 3555 54,55

Page

Act of July 27, 1789, ch. 4, § 4, 1 Stat. 28 48
Revenue Act of 1864, ch. 173, § 38, 13 Stat. 223 ..... 41, 44
Tariff Act of 1864, ch. 349, § 34, 28 Stat. 509 41
Revised Statutes of the United States § 161 (1st ed. 1873-1874) 48,-51
Revised Statutes of the United States § 3165 (1st ed. 1873-1874) 44
Revised Statutes of the United States § 3167 (1st ed. 1873-1874) 44
Act of Jan. 27, 1938, ch. 11, 52 Stat. 8 42
Act of June 25, 1948, ch. 645, § 1905, 62 Stat. 683 41
Pub.L.No. 85-619, 72 Stat. 547 (1958) 48
Pub.L.No. 94-409, 90 Stat. 1241 (1976) 57, 58
16 C.F.R. § 4.11(a)(1)(iv)(A) 19
21 C.F.R. § 20.111(c)(3)(v) 39
24 C.F.R. Part 15 54
29 C.F.R. § 70.21 47
29 C.F.R. § 70.21(a) 7
32 C.F.R. Part 1285 52
32 C.F.R. § 1285.3(d)(2)(iii)(c) 47
40 C.F.R. § 2.202(f) 39
41 C.F.R. § 1-3.103 36
41 C.F.R. Part 60-1 3
41 C.F.R. § 60-1.2 3
41 C.F.R. § 60-1.6 3
41 C.F.R. § 60-1.40 4
41 C.F.R. Part 60-2 3
41 C.F.R. § 60-2.11 4
41 C.F.R. § 60-2.12 4

Page

41 C.F.R. Part 60-40 ..... 4, 52
41 C.F.R. § 60-40.1 ..... 52, 53, 54
41 C.F.R. § 60-40.2 19
41 C.F.R. § 60-40.2(a) 5
41 C.F.R. § 60-40.2(b)(1) 5
41 C.F.R. § 60-40.3 5
41 C.F.R. § 60-40.4 5
41 C.F.R. Part 60-60 3
41 C.F.R. § 60-60.4(d) 6, 79

LEGISLATIVE MATERIALS:

S. 1142, 93d Cong., 1st Sess. (1973) 18
H.R. 5425, 93d Cong., 1st Sess. (1973) 18
7 Cong. Rec. 4005-6 (1878) 45
26 Cong. Rec. 3784 (1894) 41, 42
104 Cong. Rec. 6550 (1958) 49
112 Cong. Rec. 13641 *et seq.* (1966) 14, 17
120 Cong. Rec. 36243 *et seq.* (1974) 74
120 Cong. Rec. 17033 (1974) 27
122 Cong. Rec. H7896 *et seq.* (daily ed., July 28, 1976) 60
123 Cong. Rec. S7763 (daily ed., May 17, 1977) 24
Conf. Rep. No. 93-1200, 93d Cong., 2d Sess. (1974), reprinted in [1974] U.S. Code Cong. & Adm. News 6285 14
Conf. Rep. No. 94-1178, 94th Cong., 2d Sess. (1976) .. 59
S.Rep.No. 813, 89th Cong., 1st Sess. (1965) 14, 15, 16, 19, 34
S.Rep.No. 1165, 75th Cong., 1st Sess. (1937) 41, 42
S.Rep.No. 1621, 85th Cong., 2d Sess. (1958) 49
H.R.Rep.No. 8014, 75th Cong., 2d Sess. (1938) 42

Page

H.Rep.No. 1461, 85th Cong., 2d Sess. (1958) *reprinted in* [1958] U.S. Code Cong. & Adm. News 3352 ... 51
H.R.Rep.No. 1497, 89th Cong., 2d Sess. (1966), *reprinted in* [1966] U.S. Code Cong. & Adm. News 2418 ..... 14, 15, 16, 19, 53
H.R.Rep.No. 93-876, 93d Cong., 2d Sess. (1974), *reprinted in* [1974] U.S. Code Cong. & Adm. News 6267 14
H.R.Rep.No. 94-880, 94th Cong., 2d Sess., (1976) .. 54, 58, 60
Hearings Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, on S. 921, 85th Cong., 2d Sess. (1958) 52-53
Hearings on S. 1666 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, 88th Cong., 1st Sess. (1963) 15, 16, 31
Hearings on S. 1160 Before the Subcomm. on Admin. Practice and Procdure of the Senate Comm. on the Judiciary, 89th Cong., 1st Sess. (1965) 31
Hearings on the Administration and Operation of the Freedom of Information Act Before A Subcomm. of the House Comm. on Government Operations, 92d Cong., 2d Sess. (1972) 31, 77
Hearings on Corporate Rights and Responsibilities—Multinational Enterprises, Before the Senate Commerce Com., 94th Cong., 2d Sess. (1976) 25
Freedom of Information Act Hearings Before the Subcomm. on Admin. Practice and Procedure of the Senate Comm. on the Judiciary, 95th Cong., 1st Sess. (1977) 23, 27, 65, 77
Business Record Exemption of the Freedom of Information Act, Hearings Before the Subcomm. on Gov't. Information and Individual Rights of the House Comm. on Gov't Operations, 95th Cong., 1st Sess. (1977) 25, 29, 31, 65, 75, 77, 78

Page

TREATISES, ARTICLES & NOTES:

K. Davis, Administrative Law Treatise (1958) 73, 78

K. Davis, Administrative Law Treatise of the Seventies (1976) 21

Arnold, "Who's Going Fishing In Government Files?", *Juris Doctor,* April 1976 23

Clement, *The Rights of Submitters to Prevent Agency Disclosure of Confidential Business Information: The Reverse Freedom of Information Act Lawsuit,* 55 Tex.L Rev. 587 (1977) 74, 75

"Firms big customers for 'free information' ", *Industry Week,* Nov. 1976, at 34 23

Note, The Effect of the 1976 Amendment to Exemption 3 of the Freedom of Information Act, 76 Colum. L. Rev. 1029 (1976) 58

Note, *In Camera Inspections Under the Freedom of Information Act,* 41 U.Chi.L.Rev. 557 (1974) 35

Note, *Reverse-Freedom of Information Act Suits: Confidential Information in Search of Protection,* 70 Northwestern L.Rev. 995 (1976) 76, 79, 80

Note, *A Review of the Fourth Exemption of the Freedom of Information Act,* 9 Akron L.Rev. 673 (1976) 23

Note, *Would Macy's Tell Gimbel's: Government Controlled Business Information and the Freedom of Information Act, Forwards & Backwards,* 6 Loyola L.J. 594 (1975) 10, 29, 37

O'Reilly, *Government Disclosure of Private Secrets Under the Freedom of Information Act,* 30 Bus. Lawyer 1125 (1975) 38, 76, 80

Patten and Weinstein, *Disclosure of Business Secrets Under the Freedom of Information Act: Suggested Limitations,* 29 Ad.L Rev. 193 (1977) 20, 21, 75, 80

Schoor, "Telling Tales: How a Law Is Being Used to Pry Business Secrets from Uncle Sam's Files", *The Wall Street Journal,* May 9, 1977 23

Washington Post, July 27, 1976 23

Page

MISCELLANEOUS:

Executive Order 11246, 30 Fed. Reg. 12319, as amended by Executive Order 11375, 32 Fed. Reg. 14303 (3 C.F.R. 169, 1974) 3, 40, 47, 52-55, 56

Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act (1967) 17, 18, 53

Commission on Federal Paperwork, *Confidentiality and Privacy* (1977) 12, 21, 23, 31, 37

Letter dated March 25, 1977 from Civiletti to Mondale, accompanying *U.S. Dept. of Justice Freedom of Information Act Annual Report to Congress (1976)* 27

Memorandum, Attorney General Griffin Bell to heads of all agencies (May 5, 1977), *reprinted in* 123 Cong. Rec. S7763 (daily ed. May 17, 1977) 24

OFCCP Compliance Manual, § 2-202 3

Office of Management and Budget Policy Letter No. 78-3, Subject: Requests for Disclosure of Contractor Supplied Information Obtained in the Course of a Procurement, March 20, 1978 31

Report of the Surveys and Investigations Staff to the House Committee on Appropriations, "Federal Energy Data Collection Activities and Systems", at 15 *reprinted in Dep't. of Interior Hearings Before the House Comm. on Appropriations, Part 8,* 341-453 (1977) 10

"Summary of Meeting of Representative John E. Moss with Representative Goldwater, Jr. on the Freedom of Information Act, Nov. 10, 1975", 121 Cong. Rec. H12379 (daily ed., Dec. 11, 1975) 30

39 Op. Att'y. Gen. 1 (1937) 41

41 Op. Att'y. Gen. 166 (1953) 39, 46

41 Op. Att'y. Gen. 221 (1955) 39, 45, 46

42 Fed. Reg. 3094 (1977) 23

43 Fed. Reg. 3572 (1978) 33

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-922

CHRYSLER CORPORATION, *Petitioner,*

v.

HAROLD BROWN, ET AL., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF OF PETITIONER CHRYSLER CORPORATION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. 1a-42a) is reported at 565 F.2d 1172. The opinion of the district court (Pet. App. B, pp. 43a-57a) is reported at 412 F.Supp. 171.

JURISDICTION

The judgment of the court of appeals (Pet. App. C, pp. 58a-59a) was entered on September 26, 1977. The petition for writ of certiorari was filed on December 27, 1977, and was granted on March 6, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. Whether Exemption 4 of the Freedom of Information Act, 5 U.S.C. § 552(b)(4), mandates that confidential commercial information which falls within that exemption not be publicly disclosed by federal agencies.

2. Whether agency disclosure regulations promulgated pursuant to 5 U.S.C. § 301, 5 U.S.C. § 552, or Executive Order 11246 constitute "authorization by law", within the meaning of 18 U.S.C. § 1905, for disclosure of confidential commercial information.

3. Whether 18 U.S.C. § 1905 is a specific statutory exemption from disclosure within the meaning of Exemption 3 of the Freedom of Information Act, 5 U.S.C. § 552(b)(3).

4. Whether a person who has submitted to a government agency, confidential commercial information which assertedly is exempt from disclosure under Exemption 4 of the Freedom of Information Act, or whose disclosure assertedly would violate 18 U.S.C. § 1905, is entitled to a trial *de novo* in a suit to prevent disclosure of that information by the Government.

5. Whether a private, civil cause of action to enjoin the disclosure of information whose release would violate 5 U.S.C. § 552(b)(4) or 18 U.S.C. § 1905 should be implied under those statutes.

STATUTES AND REGULATIONS

The relevant provisions of the Freedom of Information Act, 5 U.S.C. § 552, 18 U.S.C. § 1905, 5 U.S.C. § 301, and the pertinent regulations of the Office of Federal Contract Compliance Programs, 41 C.F.R. Part 60-40, are set forth at Pet. App. D, pp. 60a-65a.

STATEMENT OF THE CASE

1. As a government contractor, Chrysler Corporation ("Petitioner") is required to comply with Executive Orders 11246 and 11375[1] ("Executive Orders") and with various implementing regulations[2] which have been promulgated thereunder by the U.S. Department of Labor's Office of Federal Contract Compliance Programs ("OFCCP"). These orders and regulations require Petitioner and other government contractors to, *inter alia,* prepare and submit to Respondents[3] a variety of reports and information, including written affirmative action programs ("AAP's") and equal employment opportunity reports ("EEO-1's"), for its entire corporate domestic operations and separately for each of its individual domestic facilities. A. 132-34.

Petitioner is required to include in every one of the nearly one hundred AAP's which it prepares annually, *inter alia,* highly detailed information of both a statistical and narrative nature concerning its staffing of each department and subdepartment at the particular facility and, within each such subdepartment, of each job classification; pay-scales; actual and expected

---

[1] 30 Fed. Reg. 12319 (1965), 32 Fed. Reg. 14303 (1967), 3 C.F.R. 169-177 (1974).

[2] 41 C.F.R. Parts 60-1, 60-2 and 60-60.

[3] Respondents are various government officials who are responsible for administering the equal employment opportunity program established by the Executive Orders. The Secretary of Labor, who has ultimate responsibility for the program, discharges his duties through OFCCP and has designated the Defense Logistics Agency (formerly, the Defense Supply Agency) ("DLA") as one of the several "compliance agencies" responsible for enforcing the Executive Orders. See Executive Order 11246, Subpart C; 41 C.F.R. §§ 60-1.2, 60-1.6; OFCCP Compliance Manual, § 2-202.

shifts in employment; and critical self-analyses where Petitioner believes it has not met its obligations under the Orders and regulations. 41 C.F.R. §§ 60-1.40, 2.11 and 2.12; A. 134. The AAP's specifically at issue below were, respectively, 175 and 257 pages in length.

The EEO-1 reports which Petitioner is required to furnish annually to Respondents for each of Petitioner's approximately one hundred facilities contain statistical information with respect to the total number, and the number of minority and female, persons employed by Petitioner in nine specified job categories. A. 133-34.

To enforce the Executive Orders, Respondents conduct "compliance reviews" and "complaint investigations." At the conclusion of these, Respondents prepare either a "compliance review report" ("CRR") or "complaint investigation report" ("CIR") which describes and discusses the documents and information submitted to Respondents by the contractor, analyzes the contractor in light of the Orders and regulations, and recommends corrective measures which the contractor should be required to implement. The reports may incorporate, in whole or in part, AAP's, EEO-1's or supporting documents. A. 134-36.

The Secretary of Labor has promulgated regulations providing for public disclosure of information from records of OFCCP and its compliance agencies. 41 C.F.R. Part 60-40; Pet. App. D, pp. 62a-65a. The regulations provide generally that "[u]pon the request of any person * * * records shall be made available for inspection and copying, notwithstanding the applicability of the exemption from mandatory disclosure [under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552], if it is determined that the requested

inspection and copying furthers the public interest and does not impede any of the functions of the OFCC[P] or the Compliance Agencies except in the case of records disclosure of which is prohibited by law." 41 C.F.R. § 60-40.2(a). In addition, the regulations specifically provide that, upon request, EEO-1 reports "shall be disclosed" (41 C.F.R. § 60-40.4) and that AAP's, subject to limited exceptions (41 C.F.R. § 60-40.3), "must be disclosed." 41 C.F.R. § 60-40.2(b)(1).

2. This action arose when DLA notified Petitioner that DLA had received requests under the FOIA for disclosure of AAP's, EEO-1's, CRR's and CIR's[4] for two of Petitioner's facilities. To the extent possible within the brief ten day period allowed by Respondents, Petitioner objected to the proposed disclosure of the documents asserting, *inter alia,* that they were exempt from disclosure under the FOIA and OFCCP's rules, and that disclosure would violate 18 U.S.C. § 1905.[5] A. 138-40.

Thereafter, DLA notified Petitioner that Respondents had determined that the documents at issue were subject to disclosure virtually in their entirety; and that Petitioner would not be furnished with a copy of the CIR or CRR prior to disclosure. In addition, Respondents stated that because they were required by

---

[4] The CIR and CRR were prepared in part on the basis of, and incorporated substantial amounts of information from, Petitioner's AAP's and EEO-1's. A. 136.

[5] Petitioner also requested that Respondents furnish Petitioner with copies of the CRR and CIR—which Petitioner had never seen—so that Petitioner might be able to determine what parts of the reports were confidential and to present intelligently its claim of confidentiality. A. 140.

the FOIA to make a substantive decision on release of the documents within ten working days of receipt of the request, they would not await the result of any administrative appeal by Petitioner of Respondents' disclosure decision under 41 C.F.R. § 60-60.4(d). A. 62, 140.

Petitioner commenced this action to enjoin Respondents from publicly disclosing the documents and to obtain a declaratory judgment that the public disclosure by Respondents of such documents was contrary to, *inter alia,* Exemptions 3 and 4 of the FOIA, 5 U.S.C. § 552(b)(3) and (4), and 18 U.S.C. § 1905. The district court conducted a trial *de novo* during which both Petitioner and Respondents presented the testimony of expert witnesses and others relating to the nature of information contained in the contested documents, the uses to which such information could be put by competitors of Petitioner, and the injury which Petitioner would suffer as a result of disclosure. Pet. App. A, p. 36a.

On April 20, 1976, the district court issued its opinion. Pet. App. B, pp. 43a-57a. The district court held that it had subject matter jurisdiction under 28 U.S.C. § 1331(a); that portions of the documents consisted of confidential commercial information whose disclosure would cause substantial competitive injury to Petitioner;[6] that such information is exempt from manda-

[6] The district court found that "the testimony clearly shows that *the manning tables are confidential* • • • [and that] the *release of the manning tables would cause Plaintiff substantial competitive harm* in several ways. First, the possession of such a document could aid another corporation in its practice of employee raiding • • • Second, the possession of a manning table would permit a competitor to determine the exact use of Plaintiff's labor force,

tory disclosure under Exemption 4 of the FOIA, 5 U.S.C. § 552(b)(4); that disclosure of that information would violate 18 U.S.C. § 1905 and 29 C.F.R. § 70.21(a); and that disclosure of those portions of the AAP's was contrary to law and should be enjoined pursuant to 5 U.S.C. § 706(2)(A). A supplemental memorandum and final order were filed on June 17, 1976. Pet. App. E, pp. 66a-67a.

On cross-appeals by the parties the court of appeals reversed. Pet. App. A, pp. 1a-42a. The court held, *inter alia,* that government agencies have discretion to disclose confidential, private documents notwithstanding the fact that they fall within an FOIA exemption; that disclosure of the type of confidential business information described in 18 U.S.C. § 1905 pursuant to agency regulations promulgated under 5 U.S.C. § 301 is "authorized by law" within the meaning of, and therefore not prohibited by, § 1905; that a cause of action to enjoin disclosure of documents which assertedly will violate FOIA Exemption 4 and 18 U.S.C. § 1905 exists only under 5 U.S.C. § 706, and that none can be implied under Exemption 4 or § 1905; and that an action to enjoin disclosure of documents was not to be conducted on a *de novo* basis but rather that review should be limited to only a determination on the basis of the agency record of whether the agency's decision to disclose was arbitrary, capricious or an abuse of

and thus the technology being applied by Plaintiff • • • [which information] would be useful in comparative analysis and would alert competitors to areas worth their managerial time. • • • Third, the possession of manning tables . . . would allow Plaintiff's competitors to reduce their risktaking." Pet. App. B, p. 51a (emphasis added). This finding was not challenged by Respondents on appeal or overturned by the court of appeals as clearly erroneous.

discretion. Finding that the agency record was inadequate, the court remanded the case with instructions that further proceedings be conducted before the agency.

SUMMARY OF ARGUMENT

The decision of the court of appeals contravenes the congressional intent underlying Exemption 4 of the Freedom of Information Act and the confidentiality provisions of 18 U.S.C. § 1905. Those statutes were enacted to ensure that private persons such as Petitioner who furnish confidential commercial information to federal agencies would be protected against the injury which public disclosure of such information by the Government would be likely to cause; without that protection, such persons would be discouraged from continuing to provide necessary information to federal agencies for use in government programs.

The decision below, however, invests broad discretion to disclose such confidential information in the very agencies and officers which the confidentiality laws were intended to restrain. By construing FOIA Exemption 4 as permissive, and by holding that agencies may legitimize disclosure of confidential information which otherwise would violate § 1905 merely by promulgating agency regulations providing for such disclosure, the lower court has emasculated two of the Nation's most important confidentiality laws. Moreover, by holding that persons aggrieved by improper disclosure are not entitled to a trial *de novo,* the court has insulated the agency's *ipse dixit* from meaningful judicial review.

In this brief, Petitioner shows that Congress intended that federal agencies should not have discre-

tion to disclose private, confidential commercial information which falls within Exemption 4 or 18 U.S.C. § 1905; that agency disclosure regulations do not authorize the release of confidential information the disclosure of which would otherwise violate § 1905; that information whose disclosure is prohibited by § 1905 is also exempt from disclosure under Exemption 3 of the Freedom of Information Act; and that a person suing to enjoin agency disclosure of confidential commercial information which assertedly falls within § 1905 and Exemption 4 has a right to a trial *de novo.*

ARGUMENT

As our nation has grown, so has the size of our government and the amount of business regulation. Today, there are literally thousands of federal departments, commissions, boards, task forces, etc., which administer a complex network of federal statutes and regulations cutting across all industries.

These federal agencies secure a constant flow of information from the private sector. While much of this information is submitted in response to statutory and regulatory filing requirements, a substantial amount is voluntarily submitted in a spirit of cooperation both in response to surveys and reporting programs conducted by the Government and in response to frequent informal requests for such data from agency officials and employees.

The information submitted by the private sector is staggering both in amount and in diversity.[7] Major

---

[7] In 1975, there were more than 5,000 federal government report forms in use. It was estimated that, in 1976, these report forms and the corresponding federal reporting requirements generated ap-

corporations each submit thousands of reports and documents every year to the federal government, and even small businesses supply the Government with a surprisingly large quantity and variety of data. These reports contain information concerning sales, manufacturing costs, technical designs, employment practices, salaries and identities of key personnel, financial forecasts, descriptions of manufacturing processes, and an endless array of other business matters. Because such reports are often submitted on a recurring basis, annually and even monthly, they provide extremely current and accurate data concerning these varied aspects of the reporting companies' operations.

In the hands of the Government, the information enables federal agencies to monitor the economy and to develop, enforce and monitor the impact of regulatory programs and policies. Indiscriminately released, the same information can reveal intimate aspects of a company's operations and can result in severe competitive or other injury to the business.[8] Consequently, many, if not most, businesses take careful precautions designed to guard against the release of such information and, apart from submission to the Government for limited regulatory purposes, generally do not pub-

---

proximately ten *billion* pieces of paper. *Report of the Surveys and Investigations Staff to the House Comm. on Appropriations, "Federal Energy Data Collection Activities and Systems"*, at 15, *reprinted in Dep't. of Interior Hearings Before the House Comm. on Appropriations*, Part 8, 341-453 (1977).

[8] "In the hands of a competitor, such data may provide the needed edge in a highly contested market." Note, *Would Macy's Tell Gimbel's: Government Controlled Business Information and the Freedom of Information Act, Forwards & Backwards*, 6 Loyola L.J. 594-95 (1975) (hereinafter *Would Macy's Tell Gimbel's*).

licly disclose much of the information which they furnish to federal agencies.[9]

Traditionally, the confidentiality of such private business information has been respected by the Government; the maintenance of such data in confidence was firmly rooted in the notion that protection of proprietary information from confiscatory disclosure is necessary not only to prevent an arbitrary taking of property, but also to stimulate creative efforts in science, technology and industry.[10] However, under some recent interpretations of the Freedom of Information Act and 18 U.S.C. § 1905—including the decision of the court below [11]—the tables of business privacy have turned to the point where, today, businesses which submit confidential information to government agencies no longer have any assurance that the confidentiality of that information will be respected.[12] Competitors,

---

[9] For example, Petitioner's written corporate policies specifically recognize that its "[i]nvestments in . . . valuable information and records represent a substantial portion of Chrysler Corporation's total worth", characterize the precise type of information at issue in this case as "sensitive" in nature, and prescribe detailed procedures to be employed in order to safeguard such information from improper disclosure. A. 30-42.

[10] Article I, Section 8, Clause 8 of the Constitution directs Congress "to promote the Progress of Science and the useful Arts." This same notion is at the heart of the Nation's patent, copyright and trade secret laws.

[11] See also *General Dynamics Corp.* v. *Marshall*, 572 F.2d 1211 (8th Cir. 1978); *Sears, Roebuck and Co.* v. *Eckerd*, —— F.2d ——, No. 77-1417 (7th Cir., April 25, 1978).

[12] "Commission studies and reports substantiate complaints of onerous, and sometimes unnecessary, Federal demands on business entities, particularly on small businesses, which can ill afford these burdens. These complaints are exacerbated by the fear that information given 'in confidence' to a Federal agency may be . . . dis-

business analysts, disgruntled employees, potential and existing adverse litigants, foreign businesses and governments and a wide variety of others are now able, virtually for the price of a postage stamp, to obtain from federal agencies confidential commercial information which, but for the lower court's construction of the FOIA and 18 U.S.C. § 1905, would not be available to them. And, further exacerbating this situation, some courts, as in the decision below, have substantially curtailed the right of a business aggrieved by threatened disclosure of its documents to obtain *meaningful* judicial relief from such conduct. The use of the FOIA for such surveillance of private affairs neither was intended nor is appropriate under the Act.

I. Federal Agencies May Not Disclose *Private* Information Which Falls Within Exemption 4 of the FOIA

The court below held that Respondents had discretion to disclose Petitioner's documents notwithstanding the fact that, as found by the district court, the documents fell within Exemption 4 of the FOIA [13] because they were confidential and commercial in nature and would cause substantial competitive injury to Petitioner if disclosed. Although it recognized that, in enacting the FOIA, Congress was clearly concerned that "disclosure of certain information might injure interests in privacy and confidentiality which may be as important as the public's right to general access to agency information", the court nonetheless rejected the notion that "Congress in the FOIA intended . . . that the exemptions make nondisclosure mandatory . . ." and held that government agencies have broad discretion to disclose exempt information. Pet. App. A, pp. 23a-25a.

closed to a business competitor under the public disclosure requirements of the Freedom of Information Act. In view of the current state of the law and the growing tendency of the business community to use the FOIA to obtain commercial information, *such apprehension appears justified.*" Commission on Federal Paperwork, *Confidentiality and Privacy* 97 (1977) (hereinafter *Paperwork Report*) (emphasis added).

[13] Exemption 4 provides that the disclosure mandate of the FOIA "does not apply to matters that are . . . trade secrets and commercial or financial information obtained from a person and privileged or confidential . . ." 5 U.S.C. § 552(b)(4); see Pet. App. D, p. 60a-61a.

As the court below observed (Pet. App. A, p. 23a), its holding is contrary to that of the court of appeals in *Westinghouse Electric Corp.* v. *Schlesinger,* 542 F.2d 1190 (4th Cir.), *cert. denied,* 431 U.S. 924 (1977). There, the Fourth Circuit concluded that Exemption 4 confers upon a supplier of private, confidential commercial information the *right* to prevent the disclosure of information which falls within the exemption. *See also Continental Oil Co.* v. *FPC,* 519 F.2d 31, 35 (5th Cir.), *cert. denied,* 425 U.S. 971 (1976); *McCoy* v. *Weinberger,* 386 F.Supp. 504 (W.D.Ky 1974); *Neal-Cooper Grain Company* v. *Kissinger,* 385 F.Supp. 769 (D.D.C. 1974).

In resolving the conflict which exists among the circuits on this question, Petitioner submits that this Court should embrace the principles articulated by the Fourth Circuit in *Westinghouse.* For, as shown below, that decision more closely accords with the purposes, as reflected in the legislative history, which the FOIA and its fourth exemption were intended to serve.

A. Congress Enacted Exemption 4 In Order To "Assure" The Protection Of Confidential Commercial Information Which Is Submitted To The Government By Private Parties

The Freedom of Information Act was intended to facilitate "the right of persons to know about the business of their *government*" [14] by "elucidat[ing] the availability of *government* records and actions to the American citizen." *American Mail Line, Ltd.* v. *Gulick,* 411 F.2d 696, 699 (D.C. Cir. 1968) (emphasis added). *See also Wellford* v. *Hardin,* 444 F.2d 21 (4th Cir. 1971); *Epstein* v. *Resor,* 421 F.2d 930 (9th Cir. 1970). By opening the processes of government to public scrutiny, thereby government would be made more accountable to the public.[15] However, Congress sought to balance the Act's disclosure philosophy with the "equally important rights of privacy with respect to certain information in government files." S.Rep.No. 813, *supra* n. 15, at 3. This was to be accomplished by including in the Act "workable standards for what records should and *should not* be open to public inspection." *Id.* at 5 (emphasis added). The standards

[14] H.R.Rep.No. 93-876, 93d Cong., 2d Sess. 5 (1974), *reprinted in* [1974] U.S. Code Cong. & Adm. News 6267, 6269 (emphasis added). *See also* Conf. Rep. No. 93-1200, 93d Cong., 2d Sess. (1974), *reprinted in* [1974] U.S. Code Cong. & Adm. News 6285, 6286; H.R.Rep.No. 1497, 89th Cong., 2d Sess. 1-2 (1966), *reprinted in* [1966] U.S. Code Cong. & Adm. News 2418; 112 Cong. Rec. 13641 13642 (1966).

[15] S.Rep.No. 813, 89th Cong., 1st Sess. 3 (1965). *See also* H.Rep. No. 1497, *supra* n. 14, at 12; *Bristol-Myers Co.* v. *FTC,* 424 F.2d 935, 938 (D.D.Cir.), *cert. denied,* 400 U.S. 824 (1970).

for what "*should not* be open to public inspection" were to be embodied in the exemptions.

This concern over rights of privacy was of particular significance to Congress in fashioning Exemption 4. That exemption was enacted for the purpose of "protecting the privacy and the competitive position of the citizen who offers information to assist government policy makers." *Bristol-Myers Company* v. *F.T.C.,* 424 F.2d at 938. *See also* S.Rep.No. 813, *supra* n. 15, at 3, 9; H.R.Rep.No. 1497, *supra* n. 14, at 10. The exemption was added to the FOIA in response to the nearly unanimously expressed fear that, absent the exemption, the Act would require disclosure of large amounts of trade secrets and confidential commercial information which had been furnished to the Government by private parties and whose disclosure could cause substantial injury to the persons and companies to whom the information belonged. *National Parks and Conservation Assn.* v. *Morton,* 498 F.2d 765, 768 (D.C.Cir. 1974); *Westinghouse Electric Corp.* v. *Schlesinger,* 542 F.2d at 1210-11. Interestingly, among the most vocal proponents of including Exemption 4 to prevent such injury were the federal government agencies. For example, a representative of the Department of Justice testified in the Senate hearings:

> "A second problem area lies in the large body of the Government's information involving private business data and trade secrets, the disclosure of which could severely damage individual enterprise and cause widespread disruption of the channels of commerce. * * *" [16]

[16] *Hearings on S. 1666 Before the Subcomm. on Admin. Practice and Procedure of the Senate Comm. on the Judiciary,* 88th Cong., 1st Sess. 199 (1963) (hereinafter *1963 Senate Hearings*).

Similarly, a witness for the Department of the Treasury stated:

> "We can see no reason for changing the ground rules of American business so that any person can force the Government to reveal information which relates to the business activities of his competitor." *1963 Senate Hearings, supra* n. 16, at 174.

Congress reacted to this legitimate need for protection of business information by enacting as an exemption to the FOIA a provision which would "assure" that trade secrets and confidential commercial information would not be subject to the disclosure provisions of the Act:

> "This exemption *would assure the confidentiality* of information obtained by the Government . . . It exempts such material if it would not customarily be made public by the person from whom it was obtained by the Government. The exemption would include business sales statistics, inventories, customer lists, scientific or manufacturing processes or developments, and negotiation positions or requirements in the case of labor-management mediations. * * * It would also include the information which is given to an agency in confidence, since a citizen must be able to confide in his government." H.R.Rep.No. 1497, *supra* n. 14, at 10 (footnote omitted) (emphasis added); *see also* S. Rep.No. 813, *supra* n. 15, at 9.

Significantly, the exemption was intended to afford protection to confidential business information "not only as a matter of fairness, but *as a matter of right* . . ." *1963 Senate Hearings, supra* note 16, at 199 (emphasis added). As stated during debate by Congressman Fascell, one of the House sponsors of the bill which was enacted as the FOIA and an authoritative

voice on the intended meaning of the Act, Congress "recognize[d] that some information *must be withheld* from public scrutiny. * * * These include . . . trade secrets [and] commercial and financial data . . ." 112 Cong. Rec. 13,649 (1966) (emphasis added).[17]

Indeed, the imperative nature of the protection which Congress intended to afford through Exemption 4 is even confirmed by the interpretation of the Act given by the Attorney General in 1967. In his Foreword to the authoritative *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act* (1967), then-Attorney General Ramsey Clark noted that, notwithstanding the disclosure provisions of the Act,

> "this law gives *assurance* to the individual citizen that his private rights will not be violated. The individual deals with the Government in a number of protected relationships which could be destroyed if the right to know were not modulated by principles of confidentiality and privacy. Such materials as tax reports, medical and personnel files, and trade secrets *must remain outside the zone of accessibility.*" *Id.* at IV (emphasis added)

As to any such material which "comes within specific categories of matters which are exempt from public

---

[17] *See also National Parks and Conservation Assn.* v. *Morton,* 498 F.2d at 769: "During hearings on this bill, the question was again raised whether businessmen would be protected against disclosure of commercial or financial information obtained by the Government pursuant to administrative regulation. * * * In reply, a member of the [S]ubcommittee [on Administrative Practice and Procedure of the Senate Judiciary Committee] stated: 'Well, there is a specific exemption in here to cover that point, and *I do not think anybody has any intention that this material be made public.*' " (Footnotes omitted) (emphasis added).

disclosure", the Attorney General stated that the Act

> "recognizes that records which cannot be disclosed without impairing rights of privacy or important operations of the Government *must be protected from disclosure.*" *Id.* at 1 (emphasis added).

The legislative history, even as interpreted by the Attorney General at the time the FOIA was enacted, thus reflects a distinct congressional intent to "assure" the confidentiality of private trade secrets and confidential commercial information which have been furnished to the Government. By enacting Exemption 4, Congress

> "declared [that such] private information acquired by the government 'should *not* be open to public disclosure.' * * * This provision in the Act was more than a simple exemption; it represented an express affirmation of a legislative policy favoring confidentiality of *private* information furnished government agencies, the disclosure of which might be harmful to *private* interests. It was manifestly intended to protect that private interest." *Westinghouse Electric Corp.* v. *Schlesinger,* 542 F.2d at 1211.

There is no indication in the legislative history which preceded enactment of the FOIA [18] that Congress in-

[18] Several isolated statements contained in the legislative history of the 1974 amendments to the FOIA which express a view that agencies have discretion to disclose exempt information are entitled to little if any weight, at least insofar as Exemption 4 is concerned. Those remarks were made some seven years after passage of the Act, by individual legislators and not by the Congress itself, in a wholly changed and highly charged political climate, and in the course of hearings which neither contemplated nor resulted in amendment of Exemption 4. See H.R. 5425, S. 1142, 93d Cong., 1st Sess. (1973). Consequently, those remarks constitute neither legislative history of Exemption 4 nor an accurate barometer of congressional intent *at the time the exemption was enacted,* and do not rebut the fact, as reflected in the original House and Senate reports, that Exemption 4 was designed to guarantee the protection of confidential commercial information. *See Illinois Brick Co.* v. *Illinois,* 431 U.S. 720, 733 n. 14 (1977); *U.S.* v. *Price,* 361 U.S. 304, 313 (1960); *Jondora Music Pub. Co.* v. *Melody Recordings, Inc.,* 506 F.2d 392 (3d Cir. 1974).

tended agencies to have the power to restrict the reach and protection of Exemption 4 by engaging in discretionary disclosure of information which clearly falls within the terms of the exemption.

B. The Lower Court's Decision Undermines The Protection Of Confidential Business Information Which Congress Intended Exemption 4 To Provide

Despite the clear purpose of Exemption 4 to "assure" the protection of confidential business information, many agencies, such as Respondents', have promulgated regulations either requiring, or allowing discretionary, disclosure of such materials even when they are exempt from release under Exemption 4 of the FOIA. See, *e.g.,* 41 C.F.R. § 60-40.2; 16 C.F.R. § 4.11 (a)(1)(iv)(A). Even assuming that these agencies were properly interpreting the breadth of Exemption 4,[19] the decision below vitiates any protection which

[19] Unfortunately, the agencies and courts have interpreted the exemption in a manner which is far more restrictive than Congress intended. Exemption 4 was specifically designed to "assure the confidentiality" (H.R.Rep.No. 1497, *supra* n. 14, at 10) of commercial information obtained by the Government which would "customarily not be released to the public by the person from whom it was obtained" (S.Rep.No. 813, *supra* n. 15, at 9) or where such disclosure might be harmful to the private interests of the party who supplied the information to the Government. *See, e.g., Sterling Drug, Inc.* v. *F.T.C.,* 450 F.2d 698, 709 (D.C.Cir. 1971); *Grumman Aircraft Engineering Corp.* v. *Renegotiation Board,* 425

could be expected under the exemption because it invests the agencies with virtually complete discretion to disclose private information notwithstanding the fact

F.2d 578 (D.C.Cir. 1970), *rev'd on other grds,* 421 U.S. 168 (1975); *M. A. Schapiro & Co.* v. *S.E.C.,* 339 F.Supp. 467, 471 (D.D.C. 1972); *Ditlow* v. *Shultz,* 379 F.Supp. 326 (D.D.C. 1974). However, in *National Parks and Conservation Assn.* v. *Morton,* the U.S. Court of Appeals for the D.C. Circuit articulated a new and considerably different interpretation of Exemption 4 which had the effect of emasculating the exemption and eviscerating the protection for business records which the Act was intended to afford:

> "commercial or financial matter is 'confidential' for purposes of the exemption if disclosure of the information is likely to [*inter alia*] cause *substantial* harm to the *competitive* position of the person from whom the information was obtained." 498 F.2d at 770 (footnote omitted) (emphasis added).

The standard adopted in *National Parks* is contrary to both the express terms and the legislative history of the exemption. *See* Patten and Weinstein, *Disclosure of Business Secrets Under the Freedom of Information Act: Suggested Limitations,* 29 Ad.L.Rev. 193, 195-202 (1977) (hereinafter *Patten*). Nothing in the FOIA or the Act's legislative history reflects any intent by Congress that Exemption 4 should not apply to information which is inherently confidential in nature, which has been customarily and reasonably treated as confidential, and which would adversely affect a business' interests if disclosed, *unless* it can be concretely shown that disclosure of such information would cause *substantial competitive* injury; indeed, proof of competitive injury as a test of confidentiality simply was not considered in the legislative deliberations on Exemption 4. *See Washington Research Project, Inc.* v. *HEW,* 504 F.2d 238, 244 (D.C.Cir.), *cert. denied,* 421 U.S. 963 (1975) ("the reach of the exemption . . . is not necessarily coextensive with the existence of competition in any form"); *Patten,* 29 Ad.L.Rev. at 197-98.

The *National Parks* test has little to recommend it. *First,* since the FOIA makes documents available to "any person", the submitter and the court may be entirely unaware of the person to whom the information is to be disclosed, how it will be used, or with what other information the data will be used in conjunction, thus making the substantial competitive injury test highly speculative and difficult to apply. *Second,* the *National Parks* test focuses

that it falls within Exemption 4 and its disclosure might substantially injure the submitter of the data.

The actions of such agencies, as approved by the court below and several others, have had the effect of turning the FOIA into a *private* disclosure statute, rather than one which increases the public's awarencss of its *government.* Thus, it has been widely acknowledged that the Act is now used largely by private parties to obtain *private* information. *See, e.g., Paperwork Report, supra* n. 12, at 99. For example, the Food and Drug Administration estimates that of nearly 25,000 FOIA requests to FDA alone, more than "80 percent . . . are from business entities, private attorneys, and FOI service companies requesting records on behalf of

only on competitive injury but ignores other kinds of commercial injury which disclosure of confidential business information might cause and which Exemption 4 was designed to prevent. *See* Davis, *Administrative Law Treatise of the Seventies* 91 (1976). *Finally,* due to the extreme burden of proof imposed by *National Parks* and the resulting need to undertake extensive economic analysis and to employ expert witnesses, most companies and individuals will be unable to shoulder the expense of challenging disclosure even though faced with the threatened release of valuable confidential commercial data. See *Patten,* 29 Ad.L.Rev. at 199-200. Congress could not have intended to trigger such a costly and complex inquiry each time a request was made for business records under the FOIA. And, that would not be the case if Exemption 4 were construed in the manner which Congress originally intended.

Although this question was argued before the court below, it is not addressed by the lower court's decision. However, because it is so basic to and interrelated with all of the questions presented by this case regarding Exemption 4 and 18 U.S.C. § 1905, Petitioner submits that the Court should undertake to review this issue as well. *See Blonder-Tongue Labs.* v. *University Foundation,* 402 U.S. 313, 321 n. 6 (1971).

corporate clients."[20] Other agencies report similar experiences.[21] While the Act has been employed to obtain private information of all kinds, its use as a private disclosure statute has been concentrated in two particular areas, both of which are at the least irrelevant, and more likely antithetical, to the purposes of the FOIA: (1) industrial espionage; and (2) circumvention of the Federal Rules of Civil Procedure.

(1) As the Fourth Circuit observed in *Westinghouse Electric Corp.* v. *Schlesinger,*

> "the industrial sector is still highly competitive. *Corporations have varying numbers of market and financial specialists who continually search out fragments of information about competitors and markets from any available source;* published government statistics and information, various legislative documents, analyses and surveys performed by consultants, field services performed by corporate specialists, information continually obtained and reported by sales personnel, or disclosures by government agencies. Since government derived information is often submitted according to statutory or regulatory requirement, it is usually more credible than information from other sources; the latter usually depends on what a company decides, for its own carefully considered reasons, to make available. *An additional reliable 'fragment' of information may be enough to bring the whole picture into much clearer focus and*

[20] *Business Record Exemption of the Freedom of Information Act, Hearings Before the Subcomm. on Gov't. Information and Individual Rights of the House Comm. on Gov't. Operations,* 95th Cong., 1st Sess. 93 (1977) (hereinafter *1977 House Hearings*) (Statement by Donald Kennedy, Commissioner, Food and Drug Admin.).

[21] *Id.* at 8 (Statement of Michael A. James, Deputy General Counsel, Environmental Protection Agency).

> *could conceivably mean the difference between success or failure in certain contract bidding situations."* 542 F.2d at 1213 n. 74 (emphasis added), quoting Note, *A Review of the Fourth Exemption of the Freedom of Information Act,* 9 Akron L. Rev. 673, 683-84 (1976).

While there previously have been few sources from which data relating to a particular company could be obtained lawfully, the FOIA, as interpreted by federal agencies and by the court below, has markedly changed this. Indeed, it is now almost universally conceded, even by the Government itself,[22] that the Act is in large measure being employed as a leading tool of "industrial espionage"[23] and "corporate intelligence gathering."[24]

[22] "The most publicized 'abuse' of the Act's processes has been its use by business entities to obtain the release of commercial information relating to their competitors. • • • Business entities also use the FOIA to obtain the results of Government research which can then be utilized for proprietary purposes. • • • [T]axpayers may be 'subsidizing the information-gathering activities of corporations.'" *Paperwork Report, supra* n. 12, at 99 (footnote omitted).

[23] Food and Drug Administration, "Public Information", 42 Fed. Reg. 3094 (1977). See, *e.g., Honeywell Information Systems, Inc.* v. *NASA,* No. 76-353 (D.D.C., July 28, 1976) (Memorandum granting plaintiff's motion for summary judgment).

[24] *Freedom of Information Act Hearings Before the Subcomm. on Admin. Practice and Procedure of the Senate Comm. on the Judiciary,* 95th Cong., 1st Sess. 4 (1977) (hereinafter *1977 Senate Hearings*) (Statement of Sherwin Gardner, Deputy Commissioner, Food and Drug Admin.). See also Burt Schoor, "Telling Tales: How a Law Is Being Used to Pry Business Secrets from Uncle Sam's Files", *The Wall Street Journal,* May 9, 1977; Mark Arnold, "Who's Going Fishing In Government Files?", *Juris Doctor,* April 1976; *Washington Post,* July 27, 1976, at A-4; "Firms big customers for 'free information'", *Industry Week,* Nov. 1976, at 34.

The use of the Act in this fashion holds in store adverse consequences not only for the companies whose information is disclosed but also for the Nation as well. Clearly, the loss of confidential commercial information by a business will often result in significant injury. Sales may be lost, the exclusivity of processes may be impaired, market shares may be reduced. In enacting the FOIA, Congress recognized these dangers and sought to disarm them by providing *dependable* protection against the occurrence of such injury. Yet, the position taken by the court below and by federal agencies is that, notwithstanding the possibility, the likelihood, or even the certainty of such injury and the fact that documents are exempt from disclosure under the FOIA, agencies still have discretion to disclose trade secrets or confidential commercial information and, under existing regulations and directives,[25] should ordinarily do so.[26]

---

[25] *See* Attorney General Griffin Bell's May 5, 1977 memorandum to heads of all agencies directing the disclosure of information, including private documents, even where the data falls within an FOIA exemption such as Exemption 4, unless disclosure will be "demonstrably harmful." *Reprinted in* 123 Cong. Rec. S7763 (daily ed. May 17, 1977) (remarks of Senator Kennedy).

[26] Disclosure of such confidential commercial data to a person or business who seeks to obtain the information for its own private use may well violate the constitutional principle that "one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid." *Thompson* v. *Consolidated Gas Utilities Corp.*, 300 U.S. 55, 80 (1937). Moreover, even if some "public purpose" could be ascribed to disclosure of private data under such circumstances, disclosure would still contravene the mandate of the Fifth Amendment that private property not be taken for public use without just compensation. *Almota Farmers E. & W. Co.* v. *United States*, 409 U.S. 470, 473 (1973). Consideration of these principles at this time is not premature, as the court below suggested (Pet. App. A, p. 41a), because the decision below clearly recognizes agency discretion to disclose Exemption 4 data notwithstanding these constitutional limitations, and because this Court's construction of Exemption 4 in the instant case must clearly accommodate these important constitutional interests.

The Nation itself will also be adversely affected by the disclosure of trade secrets and confidential commercial information. Congress has frequently expressed its concern over the loss of U.S. technology to foreign nations.[27] Numbering among those who have used the FOIA to obtain private data for private purposes are foreign governments, corporations and state owned industries who seek to obtain for free American technology which they could otherwise acquire, if at all, only under a licensing agreement,[28] and to use such information to more effectively compete against American businesses here and abroad. Use of the Act in this fashion contributes to a worsening of the competitive posture of American industry, declining production, and consequently reduced employment. *See Commerce Comm. Hearings, supra* n. 27, at 395-400. Moreover, it deprives American businesses of licensing revenues which they would otherwise receive and may impair the rights of those businesses under foreign patent systems. Finally, use of the FOIA in this manner may reveal to foreign governments valuable insights into the products, manufacturing processes, and productive capacities of American defense contractors, thereby adversely affecting not only the economic, but also the

---

[27] See, *e.g.*, *Hearings on Corporate Rights and Responsibilities—Multinational Enterprises, Before the Senate Commerce Comm.*, 94th Cong., 2d Sess. (1976) (hereinafter *Commerce Comm. Hearings*).

[28] See, *e.g.*, *1977 House Hearings, supra* n. 20, at 283, where one company's loss of its technology to a foreign competitor under the FOIA is described.

military, security of the Nation."[29] The FOIA was not intended by Congress, and should not be construed by the courts in such a way as, to have these effects.

(2) The Act also has been increasingly used by both existing and potential litigants to obtain discovery of *private* information relating to *private* parties which is not discoverable under judicial or administrative discovery rules. See, *e.g., Gifford-Hill, Inc.* v. *FTC,* 1975-2 Trade Cases ¶ 60674 (D.D.C. 1976). For example, one of the FOIA requests which gave rise to this case was filed by a person who was engaged in other litigation against Petitioner (A. 92) and who sought access under the FOIA to documents which had been denied to him by court order in discovery proceedings in that litigation.

Congress foresaw the use of the Act by private parties to obtain *government* information from government files for use in litigation against the Government, and included Exemption 5, 5 U.S.C. § 552(b)(5), which "withholds from a member of the public documents which a private party could not discover in litigation with the agency." *NLRB* v. *Sears, Roebuck & Co.,* 421 U.S. 132, 148 (1975). Exemption 7 of the FOIA, 5

[29] See, *e.g., Siemens Corp.* v. *United States,* Civ. No. 78-0385 (D.D.C.), where the FOIA requester seeks disclosure of "all information referring to . . . the military applications of devices which may be provided by electron beam lithography technologies, including . . . [*inter alia*] electronic warfare wideband receivers . . . ; ballistic missile defense systems; . . . electronic warfare jammers . . .", and to "the companies which manufactured electron beam lithography equipment . . . and the capabilities, limitations or applications of any such equipment . . ." Complaint, Exhibit 1, p. 3.

U.S.C. § 552(b)(7), was included for a similar purpose. *See* 120 Cong. Rec. 17,033 (1974) (remarks of Senator Hart, sponsor of the 1974 amendment to Exemption 7). On the basis of these provisions, courts have widely condemned the use of the FOIA as a substitute for discovery of *government* documents. *See, e.g., Columbia Packing Co., Inc.* v. *U.S. Dept. of Agric.,* 563 F.2d 495, 499 (1st Cir. 1977); *Climax Molybdenum Co.* v. *NLRB,* 407 F.Supp. 208 (D.D.C. 1975).

However, Congress did not expressly provide similar protection from surreptitious discovery for confidential commercial information which has been obtained by the Government from *private* parties. Presumably, it felt no need to do so since the purpose of the Act was to make available to the public only government, not private, records. Yet, today, the FOIA has become a major vehicle for discovery by private parties of *private* information which they cannot obtain through traditional discovery procedures for use in litigation against *private* parties.[30] The use of the Act in such a fashion circumvents the Federal Rules of Civil Procedure and the supervisory powers of the federal courts[31]

[30] *See* letter dated March 25, 1977, from Benjamin R. Civiletti, Acting Deputy Attorney General, to Hon. Walter F. Mondale, accompanying the *U.S. Department of Justice Freedom of Information Act Annual Report to Congress (1976)* ("Private counsel seem to believe that the FOIA should function as a discovery device • • • when they could not gain access to documents and records using discovery methods provided by the Federal Rules . . .").

[31] See, *e.g., Title Guarantee Co.* v. *NLRB,* 534 F.2d 484 (2d Cir.), *cert. denied,* 429 U.S. 834 (1976); and *see 1977 Senate Hearings, supra* n. 24, at 6 (Statement of Gerald P. Norton, Deputy General Counsel, Federal Trade Commission). The Federal Rules provide a litigant with a broad right of access to information from its adversary's files which is necessary for preparation of its case. When,

and is impossible to reconcile with the underlying purpose of the FOIA since "[t]he Act is fundamentally designed to inform the public about *agency* action and *not to benefit private litigants.*" *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. at 143 n. 10 (emphasis added). *See also Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1973); *EPA* v. *Mink*, 410 U.S. 73, 79 (1973). Moreover, even if use of the FOIA to obtain data relating to *agency* action for use against an *agency* in litigation could be justified,[32] use of the Act by parties in litigation to obtain *private* information relating to, and for use against, *private* parties does not comport with the purpose of the FOIA and should be condemned.

In both of the foregoing respects, the FOIA is being used—or more accurately, *abused*—for purposes which are entirely inconsistent with the congressional intent underlying the Act. Because the Act makes information available to "any person" (5 U.S.C. § 552(a)(3)) and thereby renders the requester's identity and purpose for seeking disclosure irrelevant and often unknown, it is only by affording confidential business records which fall within Exemption 4 the kind of broad protection from disclosure which Congress intended that these improper uses of the FOIA can be substantially curtailed.

---

notwithstanding this liberal access, a litigant who has been denied discovery of such data by order of a court seeks to circumvent that ruling by attempting to obtain such information under the FOIA, Petitioner submits that such disclosure is not merely contrary to the purposes underlying the Act itself but is also repugnant to the Federal Rules of Civil Procedure.

[32] See *Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U.S. at 30-33 (Douglas, J., dissenting).

C. The Lower Court's Construction of Exemption 4 To Permit Discretionary Agency Disclosure Of Confidential Commercial Information Will Discourage The Future Submission Of Such Information To The Government

In providing protection under Exemption 4 to confidential commercial information, Congress recognized that "[u]nless persons having necessary [commercial and financial] information can be assured that it will remain confidential, they may decline to cooperate with officials and the ability of the Government to make intelligent, well informed decisions will be impaired." *National Parks and Conservation Assn.* v. *Morton*, 498 F.2d at 767. *See also Soucie* v. *David*, 449 F.2d 1067, 1078 (D.C.Cir. 1971); *Would Macy's Tell Gimbel's supra* n. 8, 6 Loyola L.J. at 603-5.

Most regulatory programs administered by government agencies rely heavily upon cooperation of the regulated companies in reporting as well as in compliance. Cooperation in reporting is significant not only where information is furnished voluntarily [33] for, as demonstrated by the record in this case, even where the Government possesses the power to require the submission of information, cooperation by the submitter may improve both the quality and quantity of information which is supplied.[34] Disclosure of private documents,

---

[33] A partial listing of the information which Petitioner supplies voluntarily to federal agencies on a recurring basis was recently submitted by Petitioner to a subcommittee of the House Committee on Government Operations during hearings on Exemption 4. See *1977 House Hearings, supra* n. 20, at 251-54.

[34] In the instant case, the record recites that disclosure of the documents at issue would discourage Petitioner from continuing to

including confidential proprietary information, would disperse a crucial source of industry information and would inhibit compliance, and thereby the success of a number of government programs would be imperiled.[35]

A number of agencies have formally recognized this proposition, both at the time the FOIA was enacted and in recent months. For example, the Department of Justice stated in 1963 that

> "disclosure of private information would impede or wholly obstruct the proper performance of necessary governmental functions . . . [V]oluntary reporting programs . . . will suddenly terminate . . . [W]here the reporting is mandatory, businessmen confronted with the risk of making this information available to their competitors might be tempted to find a moral justification for misrepresenting it." *1963 Senate Hearings, supra* n. 16, at 200.

See also Hearings on S. 1160 Before the Subcomm. on Admin. Practice and Procedure of the Senate Comm. on the Judiciary, 89th Cong., 1st Sess. 436-37 (1965); *Hearings on Administration and Operation of the Freedom of Information Act, Part 5, Before the Subcomm. on Foreign Operations and Gov't Information,* 92d Cong., 2d Sess. 1619, 1679 (1972).

More than a decade later, having gained considerable experience under the FOIA, federal agencies again uniformly noted the inhibiting effect which disclosure of confidential commercial information and trade secrets would have on industry's reporting and compliance. Typical of the views presented to the Congress by federal agencies during FOIA oversight hearings in 1977 were those of the Department of Justice that disclosure of confidential information by government agencies would have "a definite restraining effect" on the flow of information to federal agencies and that, as a result, "substantial detriment to the effective performance of some governmental functions can be anticipated." *1977 House Hearings, supra* n. 20, at 232. *See also id.* at 6; Office of Management and Budget Policy Letter No. 78-3, Subject: Requests for Disclosure of Contractor Supplied Information Obtained in the Course of a Procurement, March 20, 1978, at 1; *Paperwork Report, supra* n. 12, at 2, 100.

This Court has also noted that disclosure of private documents under the FOIA will impair the Government's ability to obtain such information in the future. In *FAA Administrator* v. *Robertson,* 422 U.S. 255 (1977), the Court recognized that, even though the

---

provide information in excess of that which is required by Respondents and from freely and candidly making voluntary admissions where it has failed to comply either with Respondents' regulations or with self-imposed goals. A. 27-29.

[35] *See* "Summary of Meeting of Representative John E. Moss with Representative Goldwater, Jr., on the Freedom of Information Act, Nov. 10, 1975", 121 Cong. Rec. H12,379 (daily ed., Dec. 11, 1975). There, Congressman Goldwater observed that "any lack of predictable protection of the private sector's proprietary information under the existing Freedom of Information Act exemption . . . (5 U.S.C. § 552(b)(4)) could seriously inhibit private sector cooperation and participation."

In the instant case, the record reveals that, notwithstanding Respondents' power to compel Petitioner's submission of information and compliance with regulatory requirements, the agencies still found Petitioner's cooperation an essential ingredient to fulfillment of their regulatory functions. As they stated during the course of a review of one of Petitioner's plants: "Without the *full cooperation* that [Petitioner] exhibited, this investigation would have been extremely difficult." A. 43 (emphasis added).

FAA required that the information at issue be submitted to the agency and provided sanctions for non-cooperation, disclosure would have adversely affected airline cooperation and, as a result, the regulatory program would have been seriously impaired. 422 U.S. at 266-67. Similarly, in *NLRB* v. *Sears, Roebuck & Co.*, the Court observed:

> " 'Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances . . . to the *detriment of the decision making process*' . . . (emphasis added)." 421 U.S. at 150-51 (citation omitted).

Indeed, a number of courts have found, with specific reference to the same kinds of documents, submitted to the same government agencies, pursuant to the same reporting requirements as are involved in the instant case, that disclosure of such private documents will impair agencies' ability to collect such data from government contractors such as Petitioner in the future and will discourage reporting companies from making candid self-evaluations in such reports. *See, e.g., United States Steel Corp.* v. *Schlesinger,* 8 FEP Cases 923 (E.D.Va. 1974); *Dickerson* v. *United States Steel Corp.,* 12 E.P.D. § 11095 (E.D.Pa. 1976); and *Sanday* v. *Carnegie-Mellon University,* 12 FEP Cases 101 (W.D.Pa. 1975). Implicit in the latter finding was the recognition that disclosure of these confidential documents would discourage voluntary compliance by government contractors with the Executive Orders, upon which the affirmative action program substantially relies.

Despite all of the foregoing, Respondents asserted below that their discretionary disclosure of confidential

commercial information which falls within Exemption 4 would not disrupt the flow of data to them or impair the performance of their regulatory programs. A. 25. Petitioner submits that they are plainly wrong and that, as observed by courts, agencies and Congress itself, disclosure of such information by federal agencies will interfere with the second of Congress' two principal purposes in enacting Exemption 4—to ensure that private persons continue to furnish confidential commercial data to the Government for use in important regulatory programs.[36] To prevent this result, Petitioner submits that the Court should, in fashioning its decision in this case, consider the adverse effect which disclosure of trade secrets and confidential commercial information must have on the future submission of such information to government agencies.

D. This Court Should Declare That Federal Agencies Do Not Have Discretion To Disclose Trade Secrets And Confidential Commercial Information Which Fall Within Exemption 4

The Freedom of Information Act was conceived as a means of remedying rampant government secrecy regarding matters which Congress believed should be subject to public scrutiny. The Act was designed to

---

[36] The fact that some federal agencies, in order to acquire confidential information which would not otherwise be furnished to them, are making special arrangements to avoid the reach of the FOIA, is itself damning testimony of the frustration of government programs which is caused by the disclosure of confidential commercial information under the FOIA. See, *e.g.*, 43 Fed. Reg. 3572 (Jan. 26, 1978); *CIBA GEIGY Corp.* v. *Mathews,* 428 F. Supp. 523 (S.D.N.Y. 1977).

bring these matters within public reach, view and criticism, and thereby to make government more responsive to the citizenry.

The Freedom of Information Act was not intended, however, to undermine long standing and well founded practices of business privacy, or to expose those who, either voluntarily or in compliance with regulatory requirements, share valuable private information with government agencies to the types of injury and prejudice described above. As the Senate noted in its principal report, "[i]t is not necessary to conclude that to protect one of the interests [i.e., disclosure] the other [i.e., confidentiality] must, of necessity, either be abrogated or substantially subordinated." S.Rep.No. 813, *supra* n. 15, at 3. Yet, as construed by federal agencies and the court below, the FOIA has had precisely that effect by exposing to competitors, foreign interests, litigants or, indeed, anyone else private, confidential business records which those persons would otherwise have no right, reason or opportunity to inspect.

This development is neither required by, nor justifiable under, the FOIA. As reflected by the clear terms of the Act itself, there is a basic and inherent difference between those FOIA exemptions which obviously were intended to protect *agencies* from mandatory disclosure of *agency* information (e.g., Exemptions 1, 2, 5 and 7) and those exemptions which clearly were fashioned to protect *private,* nongovernmental interests (*e.g.,* Exemptions 4 and 6).[37] Although Congress

[37] In contrast to Exemption 4, Exemption 6 arguably does indicate an intention by Congress to invest agencies with some discretion in deciding whether to disclose information relating to private persons. By making nondisclosure dependent, at least in part, on whether release would amount to a "clearly unwarranted invasion of personal privacy", the Act suggests that agencies and courts were expected to engage in some balancing of the competing interests in disclosure and privacy. *See Dept. of Air Force* v. *Rose,* 425 U.S. 352, 372-73 (1976). No such intent is apparent in Exemption 4, whose protection is not dependent upon any such subjective determination of whether the interest in disclosure warrants the harm which release might cause but, rather, requires only a determination of whether the documents consist of trade secrets or confidential commercial information.

may have intended that disclosure of *agency* documents which fall within the first category of FOIA exemptions would ordinarily be within the agency's discretion, it intended to accord much greater protection to *private* confidential information which *private* individuals and businesses furnish to the Government, the disclosure of which would be harmful to *private* interests.[38] This is because the FOIA

> "was *not* enacted for the purpose of enabling the public to obtain information about *individuals* and *corporations,* about what those individuals or corporations are doing, or about what their activities and policies are * * *; [rather, t]he purpose of the Freedom of Information Act was to protect the people's right to obtain information about their *government,* to know what their government is doing, and to obtain information about govern-

[38] This Court's statement in *EPA* v. *Mink* that the exemptions "represent the congressional determination of the types of information that the Executive Branch must have the option to keep confidential" was made with specific reference to the applicability of Exemptions 1 and 5 to "*official information* [which had been] long shielded unnecessarily from public view . . ." 410 U.S. at 80 (emphasis added). The Court was not addressing the discretion of agencies to disclose *private* documents which fall within Exemption 4. *See In Camera Inspections Under the Freedom of Information Act,* 41 U.Chi.L.Rev. 557, 564 n. 52 (1974) ("[T]he public's interest in confining the breadth of the exemptions is not equally strong for all nine provisions.")

ment activities and policies." *Westinghouse Electric Corp.* v. *Schlesinger,* 542 F.2d at 1210 n. 64 (emphasis added)."

In enacting Exemption 4, Congress struck the balance between these competing public and private interests [40] and "opted for the right to privacy in favor of the private interest." *Id.* at 1211. As to confidential commercial information, *Congress made the judgment* in enacting the FOIA and by including Exemption 4 in the Act that the public interest would be served by such matters not being disclosed. As one court has observed:

> "A national policy exists which protects confidential business information. *Kewanee Oil Co.* v. *Bicron Corp.,* 416 U.S. 470 (1974). This policy is reflected in significant statutory and regulatory provisions which *proscribe* the disclosure of trade secrets and confidential commercial information. See for example, 5 U.S.C. § 552(b)(4) or, 41 C.F.R. § 1-3.103 (1976). These provisions recognize and provide for the nondisclosure of confidential business information compiled through an owner's efforts, skills, and resources, and, thus, *there is a public interest in favor of judicial protection of such data." USS-OCF-W&M* v. *Eckerd,* No. 76-1933 (D.D.C., Dec. 9, 1976) (emphasis added).

---

[39] "The Act is fundamentally designed to inform the public about *agency action*" (*NLRB* v. *Sears, Roebuck & Co.,* 421 U.S. at 143 n. 10 (emphasis added)), not to serve as a vehicle for the "envious competitor or the curious busybody . . . [to obtain] access to . . . private information . . ." *Westinghouse Electric Corp.* v. *Schlesinger,* 542 F.2d at 1213.

[40] *See FAA Administrator* v. *Robertson,* 422 U.S. at 262; *EPA* v. *Mink,* 410 U.S. at 80.

Congress did not intend, and did not provide in the Act, that the protection to be afforded under Exemption 4 should depend on the interpretations given to the "public interest" by countless federal agencies and employees.

Indeed, recognizing that the underlying purpose of the FOIA was to enable the electorate to inform itself on the manner in which its government was functioning, it is questionable whether members of the public should be entitled to obtain *private* documents at all.[41] While federal statutes defining "government records" are quite broad, confidential private documents and information do not lose their basic *private* character merely by virtue of the fact that those documents have been submitted to an agency either pursuant to a mandatory filing requirement or voluntarily in an effort to comply with a regulatory program.[42] As one com-

---

[41] "At a time when most of the information being requested is of interest to no one except the party requesting it and when the large majority of requests are being submitted by private industry, one may question whether the information being released is of 'public interest.' On the other hand, if the Act is to operate as it was intended—to enable citizens to deal effectively and knowledgeably with the Federal agencies—all government-held information *except that of a truly 'private' nature—such as that protected by the (b)(6) and (b)(4) exemptions*—must be viewed as of 'public interest.'" *Paperwork Report, supra* n. 12, at 100 (emphasis added).

[42] *See Would Macy's Tell Gimbel's, supra* n. 8, 6 Loyola L.J. at 611. This Court has apparently recognized this distinction by noting that the FOIA is applicable to "document[s] generated by an agency . . ." *NLRB* v. *Sears, Roebuck & Co.,* 421 U.S. at 136. *See also SDC Development Corp.* v. *Mathews,* 542 F.2d 1116, 1118-19 (9th Cir. 1976), where the court of appeals held that information compiled by an agency which did not deal with the "structure,

mentator has stated, there is a

> "philosophical distinction between exemption (4) and Government information generally; the general public has no claim to a business' secret or a financial ledger, as it might to a Government-generated highway map or agency interpretative bulletin . . . [T]here is a significant policy justification for not 'giving away for free' what private industry, *not Government,* has paid for. Government's duty to reveal *its* inner workings provides no similar justification for the disclosure of private parties' operations."[43]

Petitioner submits that only by recognizing the distinction drawn by Congress between *private* and *agency* records can the FOIA's basic disclosure policy *and* the equally important congressional policy underlying Exemption 4 *both* be given their intended effect. The Fourth Circuit, in contrast to the decision of the court below, correctly drew this distinction by holding that, regardless of the Government's discretion to disclose exempt *agency* documents, Exemption 4 mandates that *private* documents which fall within the exemption not be disclosed.[44]

---

operation and decision-making procedure" of the agency was not intended by Congress to be considered an "agency record" subject to disclosure under the FOIA.

[43] O'Reilly, *Government Disclosure of Private Secrets Under the Freedom of Information Act,* 30 Bus. Lawyer 1125, 1134 (1975) (hereinafter "O'Reilly").

[44] Some federal agencies such as the Department of the Census and the Department of Labor's Bureau of Labor Statistics, in routinely collecting private information from businesses across the nation, guarantee that the confidentiality of those data will be maintained and that disclosure will not occur unless the data is aggregated with data from other companies in a form in which the submitter cannot be identified. See 13 U.S.C. § 8(b). To the extent that information relating to private activities which falls within Exemption 4 must, *arguendo,* be disclosed in order to inform the public about how the Government is operating, such data should likewise be disclosed only on an aggregate basis in which data cannot be identified by company. This approach is expressly provided for, although not frequently utilized, under some agencies' disclosure regulations. See, *e.g.,* 21 C.F.R. § 20.111(c)(3)(V); 40 C.F.R. § 2.202(f). In following this approach, public access to information concerning government activities could be ensured without impairing "the private citizen's right to be secure in his personal affairs which have no bearing or effect on the general public." S.Rep.No. 813, *supra* n. 15, at 7.

II. Respondents' Disclosure Regulations Do Not Constitute Authorization by Law, Within the Meaning of 18 U.S.C. § 1905, for Disclosure of Confidential Business Information

Section 1905 of Title 18 of the U.S. Code prohibits any government official or employee[45] from disclosing, "to any extent not authorized by law", a number of specifically identified types of business information including, *inter alia,* confidential statistical data and information relating to a corporation's trade secrets, processes, operations and style of work. See Pet. App. D, p. 61a. Although the court of appeals did not dispute the district court's finding that substantial portions of Petitioner's documents fell within § 1905, the court held that Petitioner's documents could nevertheless be disclosed because (1) "disclosures pursuant to validly adopted agency regulations are not subject to the strictures of § 1905" because such disclosures are

---

[45] Section 1905 is applicable both to "heads of agencies" and to "the official action of a department or agency of the United States acting through its head." 41 Op. Att'y. Gen. 166, 168 (1953); 41 Op. Att'y. Gen. 221, 223 (1955).

"authorized by law"; (2) 5 U.S.C. § 301 "is a separate source of agency authority for the promulgation of disclosure regulations"; and (3) "[s]ince the OFCC[P] disclosure regulations are valid under § 301, all disclosures pursuant to those regulations are authorized by law and therefore not subject to § 1905." Pet. App. A, pp. 28a-29a.

The decision of the court of appeals should be reversed. The court's holding is both incompatible with the broad protective purpose of 18 U.S.C. § 1905 and contrary to the specific legislative history of § 1905 dealing with the term "authorized by law." Moreover, even if some agency regulations could limit the applicability of § 1905, regulations promulgated pursuant to 5 U.S.C. § 301, the FOIA, or Executive Order 11246 cannot have that effect. Finally, because 18 U.S.C. § 1905 is a statute which specifically exempts matters from disclosure within the meaning of FOIA Exemption 3, 5 U.S.C. § 552(b)(3), documents whose disclosure is barred by § 1905 are therefore also exempt from disclosure under the FOIA.

A. Agency Disclosure Regulations Do Not Constitute Authorization By Law Within The Meaning Of 18 U.S.C. § 1905

1. The court of appeals' holding that agency disclosure regulations constitute "authorization by law" for disclosure of confidential business information and thereby render inapplicable the restraints imposed by § 1905 on agency disclosure of such materials is contrary to the broad protective purpose of that statute.

Section 1905 is a codification [46] of three preexisting statutes [47] whose purpose, in prohibiting public disclosure by government officials and employees of certain types of confidential business information obtained from private parties, was to prevent the "annoyance, embarrassment, or injury" which might be caused to private persons by disclosure of such information.[48] The legislative histories of these predecessor statutes reflect that they, and subsequently § 1905, were intended to provide *maximum* protection for confidential business information against agency action which would impair the sanctity of such data, not to authorize unfettered agency discretion to disclose pursuant to agency regulations.

The original predecessor of § 1905 was contained in the Revenue Act of 1864, ch. 173, § 38, 13 Stat. 223. During the debates over its incorporation into the Tariff Act of 1864, ch. 349, § 34, 28 Stat. 509—one section of which would have authorized tax collectors and inspectors to examine the books, records and accounts of corporations—a number of Senators expressed outrage that this proposal would allow the invasion by agency personnel of the corporate taxpayer's right to protect his confidential records and business secrets from competitors. *See, e.g.,* 26 Cong. Rec. 3784 (1894) (remarks of Senator McLauren). Responding to this concern, Senator Aldrich pointed to the fact that "another section [now § 1905] *forbids* revenue agents to

---

[46] Act of June 25, 1948, ch. 645, § 1905, 62 Stat. 683.

[47] 18 U.S.C. § 216 (1940); 19 U.S.C. § 1335 (1940); 15 U.S.C. § 176a (1940).

[48] *See* 39 Op. Att'y. Gen. 1, 2 (1937); S.Rep.No. 1165, 75th Cong., 1st Sess. (1937).

disclose business secrets . . .'' 26 Cong. Rec. 3784 (1894) (emphasis added).

The prior Commerce Department nondisclosure statute, Act of Jan. 27, 1938, ch. 11, 52 Stat. 8, was intended to provide equally broad and reliable protection to certain types of confidential data. That statute provided that all confidential statisical information submitted to the Bureau of Foreign and Domestic Commerce "shall be used only for the statistical purposes for which it is supplied", and precluded publication of any such statistics in a manner that would "reveal the identity of the person, corporation or firm furnishing such data." The House report accompanying the original act stated that the purpose of the legislation was to provide "legal assurance" to submitters that confidential data "will not" be divulged. H.R.Rep.No. 8014, 75th Cong., 2d Sess. 1-2 (1938); *see also* S.Rep.No. 1165, *supra* n.48.

The predecessor statutes reflect that Congress, in enacting these nondisclosure laws and in codifying them in the broadly stated terms of § 1905, intended to provide *complete* assurance to businesses which furnish confidential information to the Government that the confidentiality of such data would not be compromised by the government officials or agencies to which such data was submitted. No mention was made at any point in the legislative histories of the predecessor statutes or of § 1905 of an intent to allow agencies to promulgate regulations authorizing release of materials the disclosure of which would otherwise be barred by § 1905 or its predecessors; nor is this surprising, since these nondisclosure statutes were enacted for the express purpose of *limiting* agency discretion to disclose

such data, not of investing agencies with such discretion. The lower court's recognition of a right on the part of agencies to promulgate such regulations will defeat the purposes of § 1905 by rendering the protection which the statute was intended to afford subject to constant change and therefore unreliable, and by withdrawing the assurance of confidentiality without which businesses will be reluctant to continue to furnish confidential information to the Government.

The court of appeals' interpretation of § 1905 as allowing agencies to limit the applicability of § 1905 to them contravenes the intent of the statute in another important respect. Section 1905 is a criminal provision aimed at preventing government officials and employees from improperly disclosing certain kinds of confidential information. The potential defendants in criminal actions to be brought under § 1905 are thus government officials. Affirmance of the decision of the court of appeals would have the untenable consequence of allowing government officials who are potential defendants, such as Respondents, to define or redefine the scope of illegal conduct under § 1905 merely by amending or promulgating agency regulations and, thereby, to relieve themselves of criminal liability for acts which, absent the slender thread of their own agency regulations, would violate 18 U.S.C. § 1905. Such a result not only violates the clear congressional intent of § 1905 but also contravenes public policy by allowing government officials who violate 18 U.S.C. § 1905 to exculpate themselves merely by promulgating

broad agency disclosure regulations in justification of their conduct."

2. In addition, the specific evolution of the "authorized by law" proviso of § 1905 demonstrates that agency regulations were not intended to constitute such authority. The Revenue Act of 1864, ch. 173, § 38, 13 Stat. 223, a precursor of § 1905, prohibited disclosure by government officials of confidential information "in any manner other than is provided *in this act.*" (Emphasis added) The law thus intended that disclosure of confidential business information would be permitted only where supported by statutory authorization, not merely by agency regulation. In the course of revising this and related statutes in 1873, this language was replaced, without explanation, by the phrase "in any other manner than may be provided *by law.*" Revised Statutes of the United States § 3167 (1st Ed. 1873-1874). That language was subsequently revised, again without explanation, to its present form to read "to any extent not authorized by law." There is no indication that Congress, in making these changes, intended to alter the meaning that the proviso had since 1864.

In contrast to these cosmetic changes, Congress did at the same time substantively amend the "authorization by law" language of another revenue provision. Section 3165 of the Revised Statutes of 1873 provided for the giving of oaths by revenue agents and em-

---

[49] "It would be an incredible rule that a legislative prohibition such as § 1905, fixing limits on executive action . . ., is to be construed and applied by the executive . . . This would be tantamount to committing the execution of such law to 'the self-restraint of the executive branch' itself and making the executive's *ipse dixit* final." *Westinghouse Electric Corp.* v. *Schlesinger*, 542 F.2d at 1215 (citations omitted).

ployees where such oaths were "authorized by law to be taken." In the course of revising this statute in 1878, Congress decided that the existing language was too narrow because it permitted only those oaths which were administered pursuant to a statutory authorization, but not those pursuant to an agency regulation. Consequently, Congress replaced the "authorized by law" language of § 3165 with the provision that oaths could be administered as "authorized by law *or regulation authorized by law.*" 7 Cong. Rec. 4005-6 (1878) (emphasis added). If the inclusion of the terminology "or regulation authorized by law" is to be treated as more than a mere superfluous or redundant exercise, then "authorized by law" must be construed as referring only to statutory authorization.

The legislative history of § 1905 thus specifically reveals that the term "authorized by law" refers only to authorization by statute, not by regulation. Although the instances in which the "authorized by law" language of § 1905 has been construed are relatively few, those cases confirm that agency regulations do not constitute authorization by law within the meaning of § 1905. For example, in 41 Op. Att'y. Gen. 221 (1955), the Attorney General, in advising the Federal Communications Commission whether § 1905 prevented disclosure of certain documents requested by Congress, noted that the agency's own regulations purported to allow full disclosure of documents at the agency's discretion. However, the Attorney General declined to rely on these regulations as "authority" for disclosure of the type of information delineated in § 1905 and, instead, advised that "the Commission should satisfy itself . . . [that disclosure is] authorized under . . . the

Legislative Reorganization Act." 41 Op. Att'y. Gen. at 228; *see also* 41 Op. Att'y. Gen. 166 (1953).

Other cases have similarly found statutes to constitute authorization by law for disclosure of confidential information which would otherwise violate § 1905. *See, e.g., United States* v. *Dickey,* 268 U.S. 378 (1925); *Consumers Union, Inc.* v. *Cost of Living Council,* 491 F.2d 1396 (T.E.C.A.), *cert. denied,* 416 U.S. 984 (1974).[50] In addition, several courts have found judicial or quasijudicial orders to constitute authorization by law within the meaning of 18 U.S.C. § 1905. *Blair* v. *Oersterlein Co.,* 275 U.S. 220, 227 (1927); *Pleasant Hill Bank* v. *United States,* 58 F.R.D. 97 (W.D.Mo. 1973); *Exchange National Bank* v. *Abramson,* 295 F.Supp. 87 (D.Minn. 1969). However, in *no* case, apart from the decisions of the court below here and in *Westinghouse Electric Corp.* v. *Nuclear Regulatory Comm.,* 555 F.2d 82 (3d Cir. 1977), has an agency regulation been construed to constitute authorization by law for disclosure of confidential documents within the meaning of 18 U.S.C. § 1905.

Accordingly, Petitioner submits that this Court should conclude that agency disclosure regulations such as Respondents' cannot constitute "authorization by

[50] Indeed, in *Consumers Union,* the defendant government officials took the position that promulgation of agency rules authorizing disclosure of otherwise nondisclosable information would not insulate them from the penalties of 18 U.S.C. § 1905. The court held that, because there actually was adequate statutory authority for disclosure, the defendants did not need to be concerned about possible liability under § 1905. Implicit in the court's discussion is the assumption that, if the statutory authority had not authorized disclosure, then the agency's regulations alone would not have constituted "authorization" for disclosure under § 1905. 491 F.2d at 1403-4.

law" for disclosure of information whose release would otherwise be prohibited by 18 U.S.C. § 1905.[51]

B. Congress Did Not Intend 5 U.S.C. § 301, The FOIA, Or Executive Order 11246 To Provide Authority For The Adoption Of Agency Regulations Which Would Limit The Applicability Of § 1905

Should this Court be of the view that agency disclosure regulations may constitute authorization by law under 18 U.S.C. § 1905, Petitioner submits that the disclosure regulations at issue in this case still would not have that effect because none of the possible legislative or Executive bases for those rules provides authority for the promulgation of disclosure regulations which would immunize agency action from the prohibition of § 1905.

[51] Even if *arguendo* an agency's regulations could serve as authority for disclosure of documents within the meaning of 18 U.S.C. § 1905, Respondents' regulations would not provide that authority in this case. For, *Respondents' regulations provide that documents whose disclosure is prohibited by § 1905 may not be disclosed.* Thus, § 70.21 of the Department of Labor's disclosure regulations prohibits any employee of the agency from disclosing any document whose disclosure would be prohibited by 18 U.S.C. § 1905. 29 C.F.R. § 70.21; see also 32 C.F.R. § 1285.3(d)(2)(iii)(c). Under 29 C.F.R. § 70.71, any supplementary disclosure provision promulgated by any division or office or the Department of Labor—including OFCCP and its compliance agencies—must be "not inconsistent with" the Department of Labor's regulations and, therefore, not inconsistent with § 1905. Accordingly, Respondents' disclosure regulations, rather than authorizing the disclosure of information which would otherwise be nondisclosable under 18 U.S.C. § 1905, specifically incorporate and apply the statute's prohibition. *Westinghouse Electric Corp.* v. *Schlesinger,* 542 F.2d at 1203; *Parkridge Hospital* v. *Blue Cross and Blue Shield,* 430 F.Supp. 1093 (E.D.Tenn. 1977).

1. *5 U.S.C. § 301 Does Not Authorize Agency Regulations In Derogation Of 18 U.S.C. § 1905*

Section 301 of Title 5 of the U.S. Code is a housekeeping statute designed to enable agencies to carry out routine administrative tasks and to promulgate regulations for the conduct of their day-to-day operations. The statute provides:

> "The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public."

The first precursors of § 301 were enacted in 1789 to enable the early executive agencies to administer their daily affairs. See, *e.g.*, Act of July 27, 1789, ch. 4, § 4, 1 Stat. 28. Those laws were consolidated into one housekeeping statute in 1874,[52] and the current version of the statute was enacted in 1958. Pub. L. No. 85-619, 72 Stat. 547 (1958).

The only significant legislative history of § 301 is that which was generated by the 1958 amendment. The final sentence of § 301 was added at that time to stop the repeated citation of the statute by agencies *as authority to withhold* information from Congress and the public. The Senate report accompanying the 1958 amendment stated:

---

[52] Revised Statutes of the United States § 161 (1st Ed. 1873-1874).

> "Nothing in the legislative history of [§ 301] shows that Congress intended this statute to be a grant of authority to the heads of the executive departments to withhold information from the public or to limit the availability of records to the public." S.Rep.No. 1621, 85th Cong., 2d Sess. 2 (1958).

During the debates on the 1958 amendment, a number of Congressmen expressed the fear that the amendment to § 301 would be deemed to require the disclosure of information that was immune from release under other statutes. Congressman Moss, the sponsor of the amendment, assured his colleagues that this was not the case. He stated that the amendment would not affect the right of agencies to withhold information pursuant to other statutes and, in particular, that the amendment would "*not affect the confidential status of information given to the Government and carefully detailed in Title 18, United States Code, Section 1905.*" 104 Cong. Rec. 6550 (1958) (emphasis added); *see also id.* at 6549, 6564. Congress' intent in amending § 301 was similarly described by Congressman Meader, who stated that § 301 was no more intended to authorize the release of information than to authorize withholding:

> "[The amendment] merely authorized department heads to make regulations governing the day-to-day housekeeping function * * * [Section 301] *was not intended to deal with the authority to release or withhold information or records.* * * * [A]uthority derived from any other sources . . . to withhold information or limit the availability of records would not in any way be affected . . ." *Id.* at 6562 (emphasis added).

In short, the amendment to § 301 was intended neither to expand or contract an agency's authority to disclose records, nor to enlarge or limit the reach of other statutes which governed an agency's power to withhold or disclose. The amendment to § 301 was intended merely to "neutralize" 5 U.S.C. § 301 so that it would not be cited as authority for withholding documents. In accomplishing that purpose, it was not Congress' intention to transform § 301 into a separate grant of authority for agency disclosure of confidential information.

Based on this legislative history, the Court of Appeals for the District of Columbia Circuit has concluded that "Section 301 does not authorize regulations limiting the scope of section 1905." *Charles River Park "A", Inc.* v. *HUD,* 519 F.2d 935, 942 (D.C. Cir. 1975). *See also Babcock & Wilcox Co.* v. *Rumsfeld,* 70 F.R.D. 595, 601 (N.D. Ohio 1976); *Parkridge Hospital, Inc.* v. *Blue Cross & Blue Shield,* 430 F.Supp. at 1098; *Metropolitan Life Ins. Co.* v. *Usery,* 426 F.Supp. 150, 170 (D.D.C. 1976). The court below, however, declined to read the legislative history in this manner. While apparently conceding that the amendment itself was not intended to authorize disclosure, the court took the position that authority to disclose documents has existed under § 301 and its predecessors since 1789—a proposition for which the court provided no support—and that the amendment did not curtail such authority. Pet. App. A, p. 29a.

The construction of § 301 by the court below is erroneous. Section 301 was never intended to authorize promulgation of regulations providing for the disclosure of information whose release was otherwise con-

trary to law."[53] Indeed, until removed "as surplusage" by the recodifiers of the present U.S. Code, the statute explicitly stated that it authorized only those regulations "not inconsistent with law." Revised Statutes of the United States § 161 (1st Ed. 1873-1874). Thus, the House Report accompanying the 1958 amendment stated that "[t]he documents involved [in § 301] are papers pertaining to the day-to-day business of Government *which are not restricted under any other specific laws* . . ." H.R.Rep.No. 1461, 85th Cong., 2d Sess. (1958), *reprinted in* [1958] U.S. Code Cong. & Adm. News 3352 (emphasis added).

Petitioner submits that the legislative history of the 1958 amendment demonstrates that Congress intended that regulations promulgated pursuant to a housekeeping statute such as § 301 be subordinate to the policy of any conflicting statute such as 18 U.S.C. § 1905. In construing § 301 in this fashion, the Court would effectuate the congressional intent that the statute not serve as a basis for either the withholding *or* the release of information.[54]

---

[53] Construing § 301 as authorizing agency disclosure regulations which restrict the applicability of 18 U.S.C. § 1905 would amount, in effect, to an implied repeal of § 1905, at least in part. As this Court has repeatedly stated, repeals by implication are not to be favored. *Bulova Watch Co.* v. *United States,* 365 U.S. 753, 758 (1961). Moreover, the fact of the matter is that where Congress has wanted to limit the applicability of § 1905 to disclosure of information by particular agencies, it has done so by *express statutory statement,* not by implication. See, *e.g.,* 15 U.S.C. § 1418(a)(2)(B), 29 U.S.C. § 664, and 42 U.S.C. § 263g(d), where Congress has specifically authorized disclosure of information whose release otherwise would have violated § 1905.

[54] This Court's decisions in *FCC* v. *Schreiber,* 381 U.S. 279 (1965), *Isbrandtsen-Moller Co.* v. *United States,* 300 U.S. 139 (1937), and *Norwegian Nitrogen Co.* v. *United States,* 288 U.S.

2. *Neither the FOIA Nor Executive Order 11246 Authorizes the Adoption of Regulations Which Would Limit the Applicability of § 1905*

Although the court below did not expressly reach the question, it intimated that, if § 301 did not support regulations limiting the applicability of § 1905, such support would be provided by the FOIA and by Executive Order 11246. As shown below, neither of these provides such support.

First, disclosure regulations such as Respondents,[55] which were promulgated for the express purpose of implementing the FOIA,[56] cannot constitute authorization by law within the meaning of 18 U.S.C. § 1905. As this Court observed in *FAA Administrator* v. *Robertson,* Congress was aware in fashioning the disclosure provisions of the FOIA that

> "there are 'nearly one hundred statutes . . . which restrict public access to specific Government records. *These would not be modified* by the public records provisions of S. 1160.' " 422 U.S. at 265 (emphasis in original)

Included among these was 18 U.S.C. § 1905. *See Hearings Before the Subcommittee on Constitutional Rights*

294 (1933), which were cited by the court below (Pet. App. A, p. 27a n. 69), are inapposite to the instant case. Although those cases recognized an agency's power to promulgate disclosure regulations pursuant to an express or implied delegation of a congressional enabling statute, they did not consider whether 5 U.S.C. § 301 constituted a base of authority for such regulations or whether an agency may promulgate disclosure regulations which authorize the disclosure of information which falls within the scope of § 1905.

[55] 41 C.F.R. Part 60-40; 32 C.F.R. Part 1285.

[56] *See* 41 C.F.R. § 60-40.1; Pet. App. D, p. 62a.

of the Senate Committee on the Judiciary, on S. 921, 85th Cong., 2d Sess. 985-87 (1958); and *see Attorney General's Memorandum, supra,* at 31-32. On the basis of the legislative history of the FOIA, the Court concluded that Congress intended that "these statutes would remain unaf[illegible]ed by the new Act" and that the Act could not be "read as repealing by implication all existing statutes 'which restrict public access to specific Government records' [H.R.Rep.No. 1497, 89th Cong., 2d Sess. 10 (1966)]." 422 U.S. at 264, 265.

Since Congress intended that the FOIA itself would not affect the applicability of preexisting nondisclosure statutes such as 18 U.S.C. § 1905, then agency disclosure regulations such as Respondents' *which were promulgated for the express purpose of implementing the FOIA* cannot have that effect. *See* 41 C.F.R. § 60-40.1. Consequently, even if Respondents' disclosure rules were promulgated in compliance with the Administrative Procedure Act and, in a general sense, have "the force of law",[57] that alone does not establish that *within the meaning of 18 U.S.C. § 1905* disclosure of the documents is "authorized by law."

Moreover, since § 1905 has been recognized as being "coextensive with" Exemption 4,[58] it can be assumed

[57] In fact, Respondents' disclosure rules—which were described as "relating solely to interpretive rules, general statements of policies, and rules of agency procedure and practice"—were promulgated without prior notice to the public or opportunity for public comment (38 F.R. 3193 (Feb. 2, 1973)) and therefore do not have "the force of law." *See National Nutritional Foods Assn.* v. *Weinberger,* 512 F.2d 688 (2d Cir.), *cert. denied,* 423 U.S. 827 (1975); *Pacific Gas & Electric Co.* v. *FPC,* 506 F.2d 33 (D.D.Cir. 1974).

[58] *See, e.g., Westinghouse Electric Corp.* v. *Schlesinger,* 542 F.2d at 1204 n. 38.

that information which falls within § 1905 is also exempt from disclosure under Exemption 4. Where an FOIA exemption is found to apply, the Act itself does not apply and therefore cannot be construed to provide "authorization by law" for disclosure within the meaning of 18 U.S.C. § 1905. H.R.Rep.No. 94-880, 94th Cong., 2d Sess. at 23 (1976); *cf. NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. at 147-8. It follows, therefore, that administrative regulations promulgated to implement the FOIA cannot be relied upon to authorize disclosure once the Act itself is found to be inapplicable. *Charles River Park "A", Inc.* v. *HUD*, 519 F.2d at 942.

Second, Executive Order 11246 is equally unavailing as a source of authority for regulations which purport to authorize disclosure of information falling within 18 U.S.C. § 1905. Although Respondents' disclosure rules refer to both the FOIA and the Executive Order as authority for the regulations, the routine reference to the Executive Order does not conceal the fact, as the rules themselves state, that the purpose of the regulations is to "implement 5 U.S.C. § 552, the Freedom of Information Act", 41 C.F.R. § 60-40.1, and thereby to satisfy the agency's responsibility under the FOIA to publish regulations stating the procedures to be followed by the agency in making documents available to the public. See 5 U.S.C. § 552(a)(3). Consequently, for the reasons noted above, regulations such as these which were adopted to implement the FOIA cannot constitute authorization by law under 18 U.S.C. § 1905.[59]

[59] *See Charles River Park "A", Inc.* v. *HUD*, 519 F.2d 935, where the rules at issue (24 C.F.R. Part 15) listed as their authority 5 U.S.C. § 552 *and* 42 U.S.C. § 3555, the latter provision which, like Executive Order 11246, granted the Secretary of the agency authority to make rules and regulations necessary to carry out the agency's functions. The court of appeals concluded that, despite the reference to 42 U.S.C. § 3555, the purpose of the rules was to implement the FOIA and it was the FOIA which served as the underlying authority for those regulations.

Moreover, the general authorization to adopt "necessary and appropriate" regulations provided by § 201 of the Executive Order—which makes no mention whatsoever of disclosure of a contractor's documents—cannot be construed as overriding, or impliedly repealing, the specific congressional prohibition in § 1905 against disclosure of confidential business information. Therefore, even if *arguendo* Executive Order 11246 could be deemed to authorize the promulgation of rules by OFCCP dealing with documents in its custody, those rules could authorize disclosure only to the extent that disclosure was not prohibited by some other law such as § 1905, or contrary to a clear statement of legislative intent such as that which underlies FOIA Exemption 4.[60] *See, e.g., Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 549 (1972); *Posadas* v. *National City Bank*, 296 U.S. 497, 503 (1936).

In each of these respects, Executive Order 11246 and the FOIA, like 5 U.S.C. § 301, fail to provide the necessary authority for adoption by Respondents of regulations which limit the applicability of § 1905. Consequently, Respondents' disclosure of Petitioner's documents—substantial parts of which were found by the district court to fall within 18 U.S.C. § 1905—is not authorized by law and would violate § 1905.

[60] Indeed, it is questionable whether an Executive Order or rules promulgated thereunder could limit the applicability of a legislative prohibition which is largely directed at the Executive Branch without running afoul of established principles of separation of powers. *See Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952).

C. 18 U.S.C. § 1905 Constitutes A Specific Statutory Exemption From Disclosure Within The Meaning Of FOIA Exemption 3

Should this Court agree with Petitioner that agency disclosure regulations promulgated under 5 U.S.C. § 301, the FOIA or Executive Order 11246 do not constitute "authorization by law" within the meaning of 18 U.S.C. § 1905, Petitioner submits that the Court should also consider the related question of whether § 1905 is a specific statutory exemption from disclosure within the meaning of Exemption 3 of the FOIA, 5 U.S.C. § 552(b)(3), and whether, therefore, documents whose disclosure would violate § 1905 are also exempt from mandatory disclosure under the FOIA. This question, which has recently been referred to as the "threshold issue" in reverse FOIA cases involving confidential commercial information[61] and on which circuit courts are presently awaiting this Court's guidance,[62] was raised in the Petition at n. 33.

Exemption 3 of the FOIA provides that the disclosure mandate of the FOIA shall not apply to matters which are

> "specifically exempted from disclosure by statute (other than section 552b of this title), *provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.*"[63] 5 U.S.C. § 552(b)(3); Pet. App. D, pp. 60a-61a.

---

[61] *Sears, Roebuck and Co.* v. *GSA*, 553 F.2d 1378, 1385 (D.C.Cir. 1977), *cert. denied*, 46 U.S.L.W. 3215 (Oct. 4, 1977).

[62] *Id.*

[63] The portion in italics was added by the 1976 amendment to the FOIA. See discussion below.

While many early decisions declined to construe § 1905 as the type of specific statutory exemption from disclosure which will trigger Exemption 3,[64] the decisions of this Court in *FAA Administrator* v. *Robertson*, the Fourth Circuit in *Westinghouse Electric Corp.* v. *Schlesinger*, and the D.C. Circuit in *Sears, Roebuck and Co.* v. *GSA*, as well as the recent amendment of Exemption 3 show that those early decisions too narrowly construed the third exemption in disregard of pertinent legislative history, and that documents such as Petitioner's whose disclosure is prohibited by § 1905 are exempt from disclosure under Exemption 3.

First, as noted above, this Court's decision in *FAA Administrator* v. *Robertson* shows that Congress, in enacting Exemption 3 of the FOIA, intended that preexisting nondisclosure statutes such as 18 U.S.C. § 1905 would remain in effect subsequent to passage of the FOIA and that the Act would not repeal or otherwise affect the applicability of those statutes. 422 U.S. at 263-66. That same view was adopted by the U.S. Court of Appeals for the Fourth Circuit in *Westinghouse Electric Corp.* v. *Schlesinger*, where the court of appeals specifically found that "§ 1905 is a statute qualifying under Exemption 3 . . ." 542 F.2d at 1201-3.

Second, the recent amendment to Exemption 3 found in § 5(b) of the Government In The Sunshine Act[65] reinforces the conclusion that 18 U.S.C. § 1905 falls within the terms of the exemption. Amended Exemp-

---

[64] See, *e.g.*, *Sears, Roebuck and Co.* v. *General Services Administration*, 509 F.2d 527, 529 (D.C.Cir. 1974); and see generally *Westinghouse Electric Corp.* v. *Schlesinger*, 542 F.2d at 1199-1203.

[65] PL 94-409, 90 Stat. 1241, approved Sept. 13, 1976, codified as 5 U.S.C. § 552b.

tion 3 provides that statutes which (A) require "that . . . [information] be withheld from the public in such a manner as to leave no discretion on the issue" or (B) establish "particular criteria for withholding or [refer] to particular types of matters to be withheld" are statutes which specifically exempt matters from disclosure by statute within the meaning of Exemption 3.

Section 1905 satisfies both provisos.[66] It satisfies proviso (A) because it does not provide for any discretion to disclose documents which fall within its terms; indeed, since § 1905 is a criminal statute, it can have no discretionary element. *See Papachristou* v. *City of Jacksonville,* 405 U.S. 156, 168-68 (1972); *Lanzetta* v. *New Jersey,* 306 U.S. 451, 453 (1939). Section 1905 also clearly satisfies proviso (B) of the exemption because it refers to particular matters to be withheld, such as trade secrets, confidential statistical data, and data relating to a manufacturer's processes, operations, profits, etc. *See Seymour* v. *Barabba,* 559 F.2d 806 (D.C.Cir. 1977). Therefore, under *either* proviso to Exemption 3, § 1905 qualifies as an exempting statute.

Nor does the isolated view expressed in the Report of the House Government Operations Committee[67] require a contrary conclusion. Although the House Report states that the purpose of the amendment to FOIA Exemption 3 was to overrule this Court's decision in *FAA* v. *Robertson,* it should be noted that the

[66] The two provisos of Exemption 3 are clearly disjunctive. *Irons* v. *Gottschalk,* 548 F.2d 992, 994 n. 3 (D.C.Cir. 1976); *see* Note, *The Effect of the 1976 Amendment to Exemption 3 of the Freedom of Information Act,* 76 Colum.L.Rev. 1029, 1041-42 (1976).

[67] H.R.Rep.No. 94-880, Part I, 94th Cong., 2d Sess. 23 (1976).

scope of the *Robertson* opinion was considerably broader than that of the amendment to Exemption 3. *Robertson* held that the FOIA could not be read to have impliedly repealed the more than one hundred nondisclosure statutes which were in existence at the time the FOIA was enacted; those one hundred statutes ranged in nature from the very specific and nondiscretionary to the very general and discretionary, the latter category exemplified by the FAA statute involved in *Robertson.* In contrast, the recent amendment to Exemption 3 relates *only* to those of the one hundred preexisting nondisclosure statutes which either (A) failed to describe with specificity the criteria for withholding or the types of material to be withheld or (B) allowed wide discretion to withhold information, e.g., the FAA statute involved in *Robertson.* Thus, as indicated by the authoritative Conference Report, PL 94-409 overrules *Robertson* only with respect to statutes which do not satisfy either of the two provisos to amended Exemption 3.[68] With respect to

[68] The Conference Report on the Sunshine Act states with respect to the amendment to Exemption 3 that "[t]he conferees intend this language to overrule the decision of the Supreme Court in Administrator, FAA v. Robertson, 422 U.S. 255 (1975), which dealt with section 1104 of the Federal Aviation Act of 1958 (59 U.S.C. 1504). Another example is section 1106 of the Social Security Act (42 U.S.C. 1306)." Conf. Rep. No. 94-1178, 94th Cong., 2d Sess. 24-25 (1976). Both § 1104 of the Aviation Act and § 1106 of the Social Security Act are statutes that, in contrast to 18 U.S.C. § 1905, provide the agency concerned with broad discretion in making disclosure decisions and, at the same time, fail to identify particular types of documents to be withheld or standards for withholding. *See Robertson* v. *Butterfield,* 498 F.2d 1031 (D.C.Cir. 1974); *Schechter* v. *Weinberger,* 506 F.2d 1275 (D.C.Cir. 1974). Nothing in the Conference Report suggests any intent to affect a statute, such as 18 U.S.C. § 1905, which clearly meets one or both of the provisos to amended Exemption 3.

the remaining nondisclosure statutes which do satisfy those requirements either by containing adequate nondisclosure criteria or by not committing disclosure to agency discretion—such as 18 U.S.C. § 1905—*Robertson* remains good law.

Moreover, the House Report constitutes a highly unreliable indicium of congressional intent regarding the amendment to Exemption 3 because the report was based on a considerably more restrictive version of Exemption 3 than that which was ultimately enacted. After being considered by the House Committee on Government Operations, the bill went to the House Judiciary Committee, which revised the proposed amendment to Exemption 3 because of its unduly restrictive scope. H.R.Rep.No. 94-880, Part II, 94th Cong., 2d Sess., 3-4, 7, 14-15 (1976). On the House floor, a substitute version which again revised the Government Operations Committee's proposal was introduced which, with one clarifying addition in conference, was the version of the amendment that was finally enacted into law. 122 Cong. Rec. H7896 (daily ed. July 28, 1976). As indicated by the remarks of Congressman McCloskey, the sponsor of the House floor amendment, the intent was to repudiate the extreme position on disclosure taken by the House Committee on Government Operations and to *include* within the exemption generally worded, nondiscretionary confidentiality statutes which he believed were excluded from the Government Operations Committee's proposal. *Id.* at 7897-98. Thus, the legislative history of the amendment to Exemption 3 reveals that preexisting nondisclosure statutes such as 18 U.S.C. § 1905 were intended to survive as Exemption 3 statutes.

Third, Petitioner's interpretation of *Robertson, Westinghouse* and amended Exemption 3 is given considerable support by the recent decision of the D.C. Circuit in *Sears, Roebuck & Co.* v. *GSA*. There, the D.C. Circuit noted a chain of events which began with that court's early refusal to consider 18 U.S.C. § 1905 as an Exemption 3 statute, continued with the subsequent decision of this Court in *Robertson*, and had as its final link the amendment of Exemption 3 in the Government In The Sunshine Act. Considering the impact of these events, the court of appeals stated that although the amendment to Exemption 3 had the clear effect of excluding from the scope of the exemption the particular statute which was involved in *Robertson*, that was not necessarily the case with 18 U.S.C. § 1905. Instead, notwithstanding the court of appeals' earlier decisions excluding § 1905 from Exemption 3, the court said that, in light of *Robertson* and the amendment of Exemption 3, the courts of the District of Columbia Circuit must now reconsider their earlier decisions to determine whether, as the D.C. Circuit implied, § 1905 is in fact an Exemption 3 statute. 553 F.2d at 1383-85.

Petitioner submits that the foregoing analysis demonstrates that 18 U.S.C. § 1905 constitutes a specific statutory exemption under FOIA Exemption 3 and compels the conclusion that Petitioner's documents, substantial parts of which were found to fall within § 1905, are also exempt from disclosure under Exemption 3 of the FOIA.

III. A Person Seeking to Enjoin Disclosure of Documents in Violation of 18 U.S.C. § 1905 or FOIA Exemption 4 Is Entitled to a Trial *De Novo*

This Court should declare that, in a civil action brought by the submitter of documents to enjoin disclosure of confidential commercial information which assertedly would contravene FOIA Exemption 4 and 18 U.S.C. § 1905, the plaintiff is entitled to a trial *de novo*. The court below, having rendered Exemption 4 and § 1905 virtually impotent to protect confidential commercial information, proceeded to deprive persons who submit such information to government agencies of the last remaining safeguard on which they can depend—the right to a trial *de novo*. Finding that a cause of action could not be implied under 18 U.S.C. § 1905 or Exemption 4, the court held that a submitter's cause of action in a reverse FOIA case arose only under the APA and that the scope of judicial review in such actions was to be limited to a determination, based on the agency record, of whether the disclosure decision was arbitrary, capricious or an abuse of discretion. Pet. App. A, pp. 23a-25a, 30a-31a, 36a-39a. Here, we demonstrate that the holding of the court below is erroneous in at least three material respects.

A. A Civil Cause of Action Giving Rise To A Right To A Trial *De Novo* Should Be Implied Under 18 U.S.C. § 1905 And FOIA Exemption 4

The decisions of this Court compel the conclusion that a cause of action to enjoin disclosure of trade secrets or confidential commercial information, which gives rise to a right to a trial *de novo*, should be implied under Exemption 4 of the FOIA and 18 U.S.C. § 1905.

1. In *Renegotiation Board* v. *Bannercraft Clothing Co.*, this Court held that the fact that Congress, in the FOIA, specifically conferred jurisdiction upon the federal district courts to grant injunctive relief to compel an agency to disclose agency records does not "suggest, despite the Act's primary purpose, that Congress sought to limit the inherent powers of an equity court." 415 U.S. at 20. In so holding, the Court specifically rejected, as being "not applicable to FOIA cases", the principle that where a statute provides a special remedy, that remedy is exclusive. *Id.*

Although the primary reason for enacting the FOIA was to promote the disclosure of nonexempt government information, the legislative history clearly reflects that Congress had an equally important purpose in enacting Exemption 4 to protect the *private interests* of persons who submit commercial data to government agencies. *National Parks and Conservation Assn.* v. *Morton*, 498 F.2d at 770; see discussion, *supra*, pp. 14-19, 33-38. As this Court has recited, in an FOIA context, "all parts of an Act 'if at all possible, are to be given effect.'" *FAA Administrator* v. *Robertson*, 422 U.S. at 261 (citations omitted). Since nothing in the Act provides any suggestion that Congress' provision in 5 U.S.C. § 552(a)(4)(B) of a specific remedy to compel disclosure of documents was intended to limit district courts' "inherent equitable powers"[**] to protect the important private interests reflected in Exemption 4, the fact that the FOIA does not expressly provide for a cause of action in favor of a person resisting

[**] *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 398 (1945).

disclosure under Exemption 4 should not be construed to imply a congressional intent to deny such a right of action under the Act. See Pet. App. A, p. 24a.

2. Moreover, implication of a cause of action on the part of a person resisting disclosure under FOIA Exemption 4 and, as well, 18 U.S.C. § 1905 is entirely consistent with this Court's decision in *Cort* v. *Ash*, 422 U.S. 66 (1975). There, the Court described the factors which are relevant in determining "whether a private remedy is implicit in a statute not expressly providing one."[10] *Id.* at 78. In applying those factors to FOIA Exemption 4 and 18 U.S.C. § 1905, it becomes amply apparent that a private cause of action, which gives rise to a right to a trial *de novo*, should be implied.

First, Petitioner is "one of the class for whose *especial* benefit" 18 U.S.C. § 1905 and FOIA Exemption 4 were enacted. As recounted above, the primary purpose of both 18 U.S.C. § 1905 and Exemption 4 was to protect individuals and companies such as Petitioner from the harm which would result if trade secrets or confidential business information which such persons submit to federal agencies were to be disclosed.

Second, although the legislative histories of § 1905 and Exemption 4 do not expressly reflect an intent to create a private cause of action for persons seeking to enjoin disclosure,[11] more significantly they do not ex-

[10] *See also J. I. Case Co.* v. *Borak*, 377 U.S. 426 (1964); *Wyandotte Transportation Company* v. *United States*, 389 U.S. 191 (1967).

[11] The fact that Congress expressly created a civil cause of action in the Privacy Act of 1974 (5 U.S.C. § 552a(g)(1)) for individuals, but not businesses, to enjoin any violation of the law, including disclosure of exempt information under the FOIA, does not lead to the conclusion reached by the court below (Pet. App. A, p. 24a) that

pressly or impliedly reflect an intent to deny one."

Third, a cause of action to enjoin federal agencies from violating federal laws by disclosing a federal government contractor's documents is clearly not a cause of action traditionally relegated to state law or of concern to the States.

Finally, implication of a civil cause of action under 18 U.S.C. § 1905 and FOIA Exemption 4 is "consistent with the underlying purposes," and would promote the goals, of those statutes. Both 18 U.S.C. § 1905 and, notwithstanding the FOIA's fundamental disclosure philosophy (Pet. App. A, p. 24a-25a), Exemption 4 constitute express statements of congressional intent that persons who submit trade secrets and confidential business information to the Government should be safeguarded from the injury which disclosure would cause. Since the loss of "confidentiality" which results from improper disclosure is nearly always *irreparable*, it is essential that a right of action to enjoin disclosure

Congress intended to deny businesses such as Petitioner the *implied* civil cause of action to enjoin disclosure which has always existed under the preexisting FOIA and 18 U.S.C. § 1905. Indeed, it is understandable that an express cause of action was not created for businesses for, in enacting the Privacy Act in 1974, Congress undertook to deal only with the impact of government information policies on individuals. It left for another day the distinct problems posed by disclosure of business records, to which Congress has recently turned its attention. See, *e.g.*, *1977 House Hearings*, *supra* n. 20; *1977 Senate Hearings*, *supra* n. 24.

[12] Here, in contrast to *National Railroad Passenger Corp.* v. *National Association of Railroad Passengers*, 414 U.S. 453 (1974), there is no "explicit legislative history" of a congressional intent to make the remedies expressly provided in § 1905 and the FOIA "exclusive" or to "preclude [the implication of] private causes of action" under those statutes.

prior to release be recognized if the congressional purposes underlying Exemption 4 and § 1905 are to be achieved; for, once confidential documents are improperly disclosed, no amount of monetary damages and no criminal or disciplinary sanctions can restore the information to its original confidential state. However, because the government officials whose responsibility it is to scrutinize the disclosure of documents under § 1905 and Exemption 4 are the very persons whose conduct the statutes are intended to control, it cannot be expected that they would recognize, expose, or institute actions against their own unlawful conduct either before or after disclosure has occurred. It is only persons such as Petitioner—who are the intended beneficiaries of § 1905 and Exemption 4 and who will be most directly injured by improper disclosure—that will be in a position, or be inclined, to serve as a "watchdog" against improper disclosure.

In each of these respects, contrary to the view of the court below (Pet. App. A, p. 30a-31a), the criminal remedy provided by § 1905 is alone inadequate to effectuate the purposes of the statute [11] and, therefore, a private cause of action on the part of those persons such as Petitioner whose documents are to be disclosed is essential if the congressional purposes underlying § 1905 and Exemption 4 are to be achieved. This was precisely the conclusion reached by the U.S. Court of Appeals for the Fourth Circuit in *Westinghouse Electric Corp.* v. *Schlesinger*. There, contrary to the decision of the court below in this case, the Fourth Circuit held both that

[11] *Wyandotte Transportation Company* v. *United States*, 389 U.S. at 202.

> "the FOIA itself . . . confers on a supplier of *private* information, an implied right to invoke the equity jurisdiction to enjoin the disclosure of information within Exemption 4"

and that a cause of action may also be implied to enjoin

> "the threat of action by a public officer '. . . contrary to a specific [federal statutory] prohibition' such as § 1905 . . ." 542 F.2d at 1210, 1209.

Recognizing that Exemption 4 and § 1905 constitute "express affirmation[s] of a legislative policy favoring confidentiality of *private* information furnished government agencies, the disclosure of which might be harmful to *private* interests", the court of appeals held that

> "when a statute, whether phrased in the form of an exemption or not, grants a private party protection from disclosure, it carries with it an implied right in the private party to invoke the equity powers of a court to assure him that protection. It matters not that the statute does not in express terms accord him that right." *Id.* at 1211.

In such an action based on an implied cause of action under § 1905 or Exemption 4, the person seeking to enjoin disclosure must be afforded a trial *de novo* on his claims under those statutes. Noting that "the protection of a competitive position is both a valuable and often complex matter, dependent on full proof," the Fourth Circuit observed:

> "Should not the person who is threatened with harm through a disclosure, which Congress has indicated clearly is against the public policy as expressed in the FOIA itself, be the proper one to assert that right to protection from disclosure

> assured him under Exemption 4, in an equity action in which he can have a *de novo* trial? The envious competitor or the curious busybody demanding access to that private information has the right to such a *de novo* trial. The Act gives it to him. But is not the same right to be implied, when the supplier, with a right that Congress gave him 'not only as a matter of fairness but as a matter of right' seeks what may be regarded as correlative relief?" *Id.* at 1213 (footnote omitted).

Similarly, with respect to the submitter's implied cause of action under § 1905, the Fourth Circuit expressed its view that

> "[t]he supplier . . . is entitled to a fair and adequate hearing, on proper evidence, in the courts, a hearing that is no less broad and adequate than that given the merely curious who may seek disclosure." *Id.* at 1215 (footnote and citations omitted).

Nor does the fact that the exemptions to the FOIA are, *arguendo,* "permissive" in nature suggest a congressional intent to limit the scope of review by district courts, as the court below concluded (Pet. App. A, pp. 23a-25a). The legislative history of the FOIA reflects significant congressional concern, as embodied in Exemption 4, that the proprietary rights of private parties in confidential commercial information which is furnished to the Government not be impinged by the Act's disclosure provisions. To disregard the applicability of a protective exemption to the FOIA and the harm which disclosure would precipitate by providing only a right of limited review would "[make] the statutory exemption meaningless and [fly] in the face of the protective purpose of the exemption . . ."

Westinghouse Electric Corp. v. *Schlesinger,* 392 F. Supp. 1246, 1250 (E.D.Va. 1974), *aff'd.,* 542 F.2d 1190 (4th Cir. 1976)."

Accordingly, Petitioner submits that the Court should hold that a cause of action to enjoin disclosure of trade secrets and confidential commercial information, which gives rise to a right to a trial *de novo,* should be implied under 18 U.S.C. § 1905 and 5 U.S.C. § 552 (b)(4).

B. A Trial *De Novo* On The Applicability Of 18 U.S.C. § 1905 And FOIA Exemption 4 Is Appropriate Even If Petitioner's Cause Of Action Arises Under The APA

In *Charles River Park "A", Inc.* v. *HUD,* the court of appeals declined to imply a private cause of action under 18 U.S.C. § 1905, and instead found that the reverse FOIA plaintiff's right of action arose under the Administrative Procedure Act. 519 F.2d at 941 n. 6. Nonetheless, the court of appeals held that the plaintiff was entitled to a *de novo* hearing in the district court on its claim that disclosure would violate 18 U.S.C. § 1905 and was contrary to an FOIA exemption. It reached that result pursuant to the following analysis.

In any reverse FOIA action, the threshold question is whether the documents which the plaintiff seeks to prevent from being disclosed are within the scope of

---

[14] The District of Columbia Circuit, while viewing the FOIA exemptions as permissive, has consistently held that a *de novo* determination of the information's status under the FOIA exemptions (and 18 U.S.C. § 1905) is appropriate. *See Sears, Roebuck and Co.* v. *GSA,* 553 F.2d at 1381; *Charles River Park "A", Inc.* v. *HUD,* 519 F.2d at 940 n.4.

any of the exemptions to the FOIA. 519 F.2d at 940-41 n. 4. If the court finds that the documents do not fall within any of the exemptions and that the Government could be forced in a traditional FOIA suit to disclose the documents, then the reverse FOIA plaintiff is entitled to no relief and the reverse FOIA action is at an end. *Id.*

In making this initial determination, the court in *Charles River Park* stated that the district court is not confined to reviewing the agency record but instead must "hold a hearing to determine whether the information involved here would have been exempt just as it would be if a suit had been brought under the FOIA to compel disclosure." *Id.* This is because in holding such a hearing, "the district court is not reviewing agency action; it is making a threshhold determination whether the plaintiff has any cause of action at all." *Id.*; *Sears, Roebuck and Co.* v. *GSA,* 553 F.2d at 1381;[75] *Sonderegger* v. *Department of Interior,* 424 F.Supp. 847, 848-49 (D.Id. 1976); *Hughes Aircraft Co.* v. *Schlesinger,* 384 F.Supp. 292 (C.D.Cal. 1974), *appeal pending,* No. 75-1064 (9th Cir.).

Similarly, in determining whether disclosure would contravene the criminal prohibition of a nondisclosure statute such as 18 U.S.C. § 1905, the court is not reviewing the agency's exercise of discretion. Rather, it

[75] In *Sears,* another panel of the D.C. Circuit reached the same conclusion, although on somewhat differently articulated grounds:

> "[S]ince this reverse FOIA case is brought as a declaratory judgment action * * * on whether any of the documents are exempt under the FOIA, * * * *not for review of agency action* under the APA [,t]he review standard of the FOIA in a suit to compel disclosure is also the appropriate standard in the reverse FOIA case." 553 F.2d at 1381 (footnote and citation omitted) (emphasis added).

is engaging in a basic exercise of statutory interpretation which requires the *de novo* receipt of evidence "so the court [can] better determine whether [the document falls] within . . . the statutory language of § 1905."[76] *Westinghouse Electric Corp.* v. *Schlesinger,* 542 F.2d at 1215; *Charles River Park "A", Inc.* v. *HUD,* 519 F.2d at 943.

Indeed in reverse FOIA cases arising under Exemption 4 and 18 U.S.C. § 1905, a district court will never be called upon to review agency discretion or agency action. On the one hand, should the district court find that the documents do not fall within an exemption to the FOIA, then the documents *must* be disclosed. On the other hand, should the district court find that the information falls within Exemption 4 or that its disclosure would violate 18 U.S.C. § 1905, there would still be no occasion for the court to review any act of agency discretion. For, as shown above, an agency has *no* discretion to disclose private, confidential commercial information which falls within Exemption 4; and, likewise, an agency has *no* discretion to release information the disclosure of which would violate § 1905."[77]

[76] The primary rationale behind the doctrine of deference to administrative interpretations of statutes is the notion of administrative expertise. *Wilderness Society* v. *Morton,* 479 F.2d 842, 866 (D.C.Cir.), *cert. denied,* 411 U.S. 917 (1973). Because the question of whether documents fall within 18 U.S.C. § 1905 or §552 (b)(4) is one which "does not significantly engage the agency's expertise", the judiciary is ultimately the institution best equipped to perform that task. *Barlow* v. *Collins,* 397 U.S. 159, 166 (1970), quoting *Hardin* v. *Kentucky Utilities Co.,* 390 U.S. 1, 14 (1968) (Harlan, J., dissenting).

[77] The court below, while reaching the wrong result, appeared to recognize this: "It seems to us that in reverse FOIA cases under the APA a reviewing court should make the following analysis. First it should inquire whether any non-disclosure statute or non-

Moreover, even assuming *arguendo* that FOIA Exemption 4 is "permissive", the district court still would be required initially to determine *de novo* whether the documents fall within the exemption or the terms of 18 U.S.C. § 1905. Only if the court found on that basis that the documents were exempt from mandatory disclosure under the FOIA but were not protected from release by a nondisclosure statute such as § 1905 would the agency's decision to disclose constitute a discretionary act; and only at that time would review by the district court need to be based on an "agency record."

Accordingly, in actions brought to enjoin disclosure of private documents which assertedly will contravene FOIA Exemption 4 and 18 U.S.C. § 1905, the only (or at least the threshold) inquiry for the district court is whether the documents fall within the terms of those statutes. Because that inquiry involves no consideration of agency action or discretion and is not, therefore, dependent upon a preexisting agency record, the reverse FOIA plaintiff should be afforded a trial *de novo* even if his cause of action is deemed to arise under the APA.

C. Reverse FOIA Plaintiffs Are Entitled To A Trial *De Novo* In Exemption 4 Cases Because Of The Inherent Inadequacy Of Agency Fact-finding Procedures Under The FOIA

Even if the Court were of the view that a reverse FOIA action under Exemption 4 and 18 U.S.C. § 1905

---

disclosure regulation is applicable. If so, the court must conclude that the agency has acted outside the scope of its statutory authority, and should enjoin disclosure. • • •" Pet. App. A, p. 38a.

does seek review of agency action and that the limitations on judicial review set forth in the APA would ordinarily be applicable, Petitioner submits that a trial *de novo* would still be mandated under this Court's decision in *Citizens To Preserve Overton Park* v. *Volpe*, 401 U.S. 402 (1971), because of the nature and *inherent inadequacies* of the factfinding procedures employed by all federal agencies in Exemption 4 cases.

Under § 706(2)(F) of the Administrative Procedure Act, 5 U.S.C. § 706(2)(F), "*de novo* review is authorized when the agency action is *adjudicatory* in nature and the agency *fact finding procedures are inadequate.*" *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. at 415 (emphasis added).[78] Although the court below noted this principle, it rejected its application to the instant case.[79]

The factfinding procedures employed by all federal agencies in cases involving Exemption 4 and 18 U.S.C.

---

[78] There can be no doubt that decisions to disclose documents which are assertedly immune from disclosure under the FOIA or 18 U.S.C. § 1905—decisions which require determination of the type of information contained in the disputed documents, the uses to which the information could be put if disclosed, and the effect which disclosure will have on the submitter—are adjudicatory in nature. See 1 K Davis, *Administrative Law Treatise*, § 7.02 at 413 (1958); *Bi-Metallic Inv. Co.* v. *State Board of Equalization*, 329 U.S. 441, 446 (1971).

[79] The court of appeals' action was based, at least in part, on its view that the district court had not considered the issue. See Pet. App. A, p. 37a. In fact, the issue was briefed and argued by the parties before both the district court and the court of appeals. Apparently, the district court found *sub silentio* that *de novo* review was appropriate under 5 U.S.C. § 706. See Pet. App. B, p. 48a. The court of appeals, however, declined to reach the question and *sub silentio* rejected Petitioner's argument. Pet. App. A, p. 37a.

§ 1905 are inherently inadequate because of the constraints imposed on the agencies by the FOIA itself. The principal limitation on agency factfinding found in the Act appears in § 552(a)(6)(A)(i) which requires that an agency determine *within ten working days* from the initial date of an FOIA disclosure request whether to comply with the request.[80] This rigid time limitation imposes insuperable defects in agencies' factfinding procedures in several respects.[81]

First, because of the extremely short time available to submitters in which to submit objections to disclosure (generally, less than five days), it is often impossible for submitters to analyze thoroughly the documents to be disclosed and to submit the kind of detailed documentary and testimonial economic evidence which agencies require on the issue of whether disclosure of the documents would cause substantial competitive injury [82] to the submitter. Indeed, since the question of whether to disclose confidential commercial information or trade secrets is a complex matter requiring analysis of copious documents and possible testimony by expert witnesses, allowance of only five or fewer days

[80] President Ford vetoed the bill because, *inter alia,* he considered the time limits imposed upon agencies unworkable. President's Veto Message, 120 Cong. Rec. 36,243-44 (1974). His veto was overridden.

[81] "Ten days is clearly insufficient to complete the lengthy process of notification of submitters, preparation of arguments by submitters, and consideration of these arguments by agencies." Clement, *The Rights of Submitters to Prevent Agency Disclosure of Confidential Business Information: The Reverse Freedom of Information Act Lawsuit,* 55 Tex.L.Rev. 587, 635 (1977) (hereinafter *Clement*).

[82] See n. 19, *supra.*

for submission of comments is often tantamount to a denial of a right to object at all.[83]

Second, as many agencies have admitted, even where the submitter is able to compile his case for exemption within the several days afforded to him, the statutorily mandated ten day time limit simply does not afford enough time for the agency to evaluate the sophisticated economic issues involved in Exemption 4 cases.[84] Moreover, because of these same time constraints, submitters' objections and the agencies' consideration of those

[83] Because of the inadequate time to object when a request for disclosure is received by the agency, the mode of review endorsed by the court of appeals—review on the agency record—will require all companies such as Petitioner, who submit confidential information to the Government which they would assert is nondisclosable, to create a complete agency record in support of their claim of confidentiality *at the time the documents are first submitted* and *before* it is known whether a request for disclosure will ever be made. For a company such as Petitioner which submits hundreds of thousands of pages of documents each year to the Government, thousands of which are truly confidential in nature, the burden of creating such a record in each instance would be so great as to practically preclude Petitioner from asserting these rights of confidentiality in most cases. For federal agencies and the taxpaying public, the costs of developing and considering such an agency record each time an assertedly confidential document is filed would be equally unacceptable. In short, the decision of the lower court "would place an intolerable burden upon . . . [submitters and federal agencies] which, in my view, Congress never intended to inflict." *Dept. of Air Force* v. *Rose,* 425 U.S. 352, 385 (1976) (Burger, C.J., dissenting). *See Patten, supra* n.19, 29 Ad. L.Rev. at 200.

[84] *See, e.g., 1977 House Hearings, supra* n. 20, at 5 (". . . because the Freedom of Information Act requires an initial response within 10 days, the [EPA] decided that there was no time to evaluate the issue involved in a particular situation except in those cases where information is clearly not entitled to confidential treatment . . ."); and see *Clement, supra* n. 81, 55 Tex.L.Rev. at 635.

objections are necessarily generalized and conclusory in nature and, conseqently, give rise to an inadequate "record" of the agency's action. Thus, for example, the "administrative records" in this case (A. 51-102, 103-129) consist merely of the agency's unexplained and unsubstantiated opinions that the information does not fall within Exemption 4 or 18 U.S.C. § 1905 and will not injure Petitioner if disclosed, findings which were contrary to those reached by the district court after a *de novo* trial. Totally absent from the agency record was any careful analysis of Petitioner's claim that disclosure would cause it substantial competitive injury, a claim which Petitioner would have documented even more fully had it been afforded adequate time.

In addition to these time constraints, the administrative factfinding process in Exemption 4 suffers from a total lack of necessary expertise. As courts,[85] commentators,[86] and even the agencies themselves have repeatedly observed over the decade in which the FOIA has been in force, federal agencies are unable to evaluate the competitive consequences of disclosure of confidential commercial documents because of the agencies' total lack of expertise in the economic disciplines necessary to analyze the complex questions presented by

[85] See, *e.g.*, *Westinghouse Electric Corp.* v. *Schlesinger*, *supra*, 542 F.2d at 1212-13, where the Fourth Circuit observed that the agency, in contrast to the submitter of the documents, "does . . . [not] have, . . . in most instances, sufficient knowledge to assert properly the private party's right to confidentiality."

[86] See, *e.g.*, O'Reilly, *supra* n.43, 30 Bus. Lawyer at 1134; Note, *Reverse-Freedom of Information Act Suits: Confidential Information in Search of Protection*, 70 Northwestern L.Rev. 995, 998-99 (1976) (hereinafter *Reverse FOIA Suits*).

claims of confidentiality under Exemption 4.[87] Thus, a representative of the Federal Trade Commission recently bemoaned his agency's inability to make the kinds of judgments necessary in Exemption 4 cases:

> "[E]ach request for information calls for an individual and often an original analysis involving a series of dynamic factors. In determining whether release will cause substantial competitive harm, an examination of such factors including the make-up of the industry, the submitter's position therein, the age of the documents in question, and the ability of competitors to glean such information elsewhere will often be required. Aside from the fact that this exemption is not susceptible to ready application and calls for a burdensome and time-consuming series of evidentiary analyses, a further problem arises. *The processors of Freedom of Information Act requests are not industry analysts or financial experts and therefore often lack the expertise* required to perform an analysis akin to those undertaken in the *National Parks* cases, particularly in the limited time allowed under the Act, even if the required information were readily available." *1977 Senate Hearings, supra* n. 24, at 13 (emphasis added); *see also 1977 House Hearings, supra* n. 20, at 5.

This lack of adequate time and expertise is particularly significant when it is recalled that an analysis of competitive injury, such as is required under the courts' current interpretation of Exemption 4, requires factual analysis of detailed evidentiary matte s,

[87] *See Hearings on the Administration and Operation of the Freedom of Information Act Before A Subcomm. of the House Comm. on Government Operations*, 92d Cong., 2d Sess. 1619, 2114 (1972), where some of Respondents' agencies testified concerning their inability to make such analyses.

not generalized application of agency regulations;[88] and that, since the disclosure of even mere fragments of information can often have significant consequences, competitive and otherwise, to the affected business,[89] an agency may simply be unable to recognize the presence of valuable information in a document which it proposes to release.

Numerous other aspects of the agency disclosure process and the FOIA itself demonstrate the inherent inadequacy of the factfinding procedures employed by federal agencies in cases involving Exemption 4 and 18 U.S.C. § 1905. *First,* neither the FOIA nor most agency regulations require that notice be provided to persons whose documents are to be disclosed; and, in practice, many agencies often do not provide such notice. *See, e.g., 1977 House Hearings, supra* n. 20, at 93-94. *Second,* agency disclosure regulations uniformly deny submitters the opportunity to cross-examine government experts, if any, or to otherwise challenge the basis for the Government's decision to disclose, a right which the D.C. Circuit recently recognized in *Sears, Roebuck and Co.* v. *GSA* as essential in cases such as this where the confidentiality of documents is at issue. 553 F.2d at 1382. Some agencies even deny the submitter the right to *assert* that its documents are confidential, and thereby exclude the person whose vital interests are at stake from ensuring that the agency record reflects and considers his position regarding disclosure.[90] *See 1977 House Hearings, supra* n. 20, at 93-94.

[88] 1 K. Davis, *Administrative Law Treatise,* § 7.02 at 412-15 (1958).

[89] *Westinghouse Electric Corp.* v. *Schlesinger,* 542 F.2d at 1213.

[90] Indeed, in the instant case, Respondents refused to provide Petitioner with copies of two of the documents which were to be disclosed—which Petitioner had not previously seen. Thereby, Respondents undermined Petitioner's ability to develop a factual record in support of its claim of confidentiality and deprived themselves of a necessary predicate for a fair and intelligent agency ruling.

Third, as demonstrated by this case, the FOIA does not require an agency to make findings in support of its decision to disclose and, in fact, virtually no agencies do so, thereby making judicial review on the basis of an "agency record" impossible. Moreover, when the record is supplemented by the agency on remand from the district court to permit judicial review, the supplementary material is characteristically an after-the-fact defense of the agency's prior decision and, consequently, the impartiality of the agency's decision is destroyed. *Finally,* as also reflected by this case, few agencies afford the submitter an administrative appeal from an adverse initial disclosure decision [91] and, even when they do, that right is often illusory because of the inadequacy of the underlying agency record and, more importantly, because agencies, under compulsion of the FOIA time limits, must disclose the documents prior to completion of the appeal.[92]

Apart from these limitations, it must also be recalled that many agencies are now characterized by an insti-

[91] *Reverse FOIA Suits, supra* n. 86, 70 Northwestern U.L. Rev. at 999.

[92] Although Respondents had in force a regulation (41 C.F.R. § 60-60.4(d)) which provided for a review and appeal procedure at the time Petitioner's documents were initially furnished to Respondents, the agencies' own documents show that, solely for reasons of Respondents' own administrative expedience, they did not allow Petitioner or other contractors to utilize that procedure until the time a request for public disclosure was received. A. 48. Yet, at that point, even though the intent of § 60-60.4(d) was to allow for an appeal of an adverse ruling on confidentiality *prior* to disclosure, Respondents refused to stay disclosure pending such an appeal. A. 49.

tutional bias in favor of disclosure [93] which may render these agencies insensitive to businesses' claims of confidentiality and may well impair an agency's ability to develop a fair and adequate record of the administrative action. Indeed, as a result of the 1974 amendments to the FOIA,[94] agencies have little or no incentive to protect the confidentiality of private information.[95]

In each of these respects, the factfinding procedures by which federal agencies decide to disclose private documents which assertedly are exempt from disclosure under FOIA Exemption 4 are wholly inadequate.

---

[93] *Patten, supra* n. 19, 29 Ad.L.Rev. at 204.

[94] The 1974 amendments to the FOIA were intended to assist parties seeking disclosure by, *inter alia*, specifying a rigid timetable for agencies to follow in acting upon requests for disclosure (5 U.S.C. § 552(a)(6)(A)(i) and (a)(6)(A)(ii)), providing for disciplinary action against government officials who arbitrarily deny FOIA requests (5 U.S.C. § 552(a)(4)(F) and (a)(4)(G)), and permitting plaintiffs who substantially prevail in an action to compel disclosure to recover reasonable attorneys' fees and other costs from the Government (5 U.S.C. § 552(a)(4)(E)). These factors, together with the rapidly escalating number of FOIA requests which all federal agencies are now receiving, make it "easier" for an agency official to disclose documents rather than to refuse to disclose them, even though those documents may be deserving of protection. See also n. 25, *supra*.

[95] The Fourth Circuit, quoting several commentators, observed that " 'the agencies cannot always be relied upon to protect adequately the confidentiality of that information. • • • Counsel for the agency . . . has little or no incentive to protect the secrets of the business community. • • • It may be bad for appearances in a period of "openness" and "honesty" for an agency to refuse disclosure from its files.' " *Westinghouse Electric Corp.* v. *Schlesinger*, 542 F.2d at 1212, *See O'Reilly, supra* n. 43, 30 Bus. Lawyer at 1134; *Reverse FOIA Suits, supra* n. 86, 70 Northwestern U.L. Rev. at 998-99.

While it is well recognized that inadequacies in the administrative record can be remedied by "obtain[ing] from the agency, either through affidavits or testimony, such additional explanation of the reasons for the agency decision as may prove necessary", inadequacies in the agency's factfinding process itself cannot be cured by remand to the agency and must give rise to *de novo* review of the agency's adjudicatory action by the district court. *Camp* v. *Pitts*, 411 U.S. 138, 142-43 (1973). This is particularly true with respect to factfinding in Exemption 4 cases because the inadequacies described above are not merely isolated problems of but a few agencies which could be cured by remand on a case-by-case basis; rather, they are systemic ailments which plague all federal agencies because of the terms and requirements of the FOIA itself.

Consequently, at least until Congress amends the Act to eliminate these deficiencies, Petitioner submits that this Court should hold that a person seeking to enjoin the disclosure of documents which assertedly are protected by Exemption 4 or 18 U.S.C. § 1905 has a right to a trial *de novo*.[96]

---

[96] Recognition of a right to a trial *de novo* will not result in any greater burden on the district courts because (1) evidentiary hearings in Exemption 4 cases, while often complex in economic theory, usually require only a brief trial or are resolved on summary judgment motions; (2) review on the basis of the agency record, because of the fact finding deficiencies noted above, will typically require one or more remands to the agency, thus resulting in multiple district court proceedings (see, *e.g.*, cases cited at n. 11, *supra*); and (3) even absent a right to a *de novo* trial, district courts would still have to engage in evidentiary hearings in deciding whether to issue temporary or preliminary injunctive relief.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

BURT A. BRAVERMAN
FRANCES CHETWYND
COLE, ZYLSTRA & RAYWID
2011 Eye Street, N.W.
Washington, D.C. 20006

A. WILLIAM ROLF
P.O. Box 1919
Detroit, Michigan 48288

Attorneys for Petitioner
Chrysler Corporation

June 5, 1978

Supreme Court, U. S.
FILED
AUG 11 1978
MICHAEL RODAK, JR., CLERK

No. 77-922

In the Supreme Court of the United States

OCTOBER TERM, 1978

CHRYSLER CORPORATION, PETITIONER

v.

HAROLD BROWN, SECRETARY OF DEFENSE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS

WADE H. McCREE, Jr.,
Solicitor General,
BARBARA ALLEN BABCOCK,
Assistant Attorney General,
WILLIAM C. BRYSON,
Assistant to the Solicitor General,
LEONARD SCHAITMAN,
PAUL BLANKENSTEIN,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes and regulations involved	2
Statement	4
Introduction and summary of argument	13
I. The Freedom of Information Act does not authorize a court to prevent a federal agency from releasing agency records	18
A. The Freedom of Information Act exemptions are permissive rather than mandatory	18
1. The FOIA "does not apply to" exempted materials	18
2. The legislative history shows that the exemptions give officials discretion concerning release	20
3. The exemptions pertaining to private interest should be treated like the other exemptions	27
B. The Freedom of Information Act does not create a private right of action to enjoin disclosure	32
II. The Trade Secrets Act provides no basis for enjoining the disclosure of information pursuant to agency regulation	36
A. Disclosure of agency records, pursuant to OFCCP regulations, does not violate the Trade Secrets Act	36
1. Disclosure of agency records is "authorized by law" within the meaning of the Trade Secrets Act if it is authorized by agency regulations	36

271-103—78——1

Introduction and summary of argument—Continued
II. The Trade Secrets Act—Continued
2. The disclosure regulations were issued under appropriate authority — Page 45
a. Executive Order 11246 provides authority for the OFCCP disclosure regulations — 45
b. The OFCCP disclosure reglations are authorized by the executive housekeeping statute, 5. U.S.C. 301 — 49
B. The Trade Secrets Act does not create a private right of action to enjoin disclosure — 53
III. Judicial review of an agency decision to disclose records is available only on the administrative record under the standards of the Administrative Procedure Act — 56
Conclusion — 62

CITATIONS

Cases:

Adamo Wrecking Co. v. *United States*, No. 76–911, decided January 10, 1978 — 44
Administrator, Federal Aviation Administration v. *Robertson*, 422 U.S. 255 — 13–14, 19, 24
Bivens v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388 — 55
Blair v. *Oesterlein Co.*, 275 U.S. 220 — 37
Board of Curators v. *Horowitz*, No. 76–695, decided March 1, 1978 — 61
Boske v. *Comingore*, 177 U.S. 459 — 49
Caha v. *United States*, 152 U.S. 211 — 38
Califano v. *Sanders*, 430 U.S. 99 — 25
Camp v. *Pitts*, 411 U.S. 138 — 56
Chandler v. *Roudebush*, 425 U.S. 840 — 51, 56
Charles River Park "A", Inc. v. *Department of Housing and Urban Development*, 519 F. 2d 935 — 26
Citizens to Preserve Overton Park v. *Volpe*, 401 U.S. 402 — 56, 59
Consolo v. *Federal Maritime Commission*, 383 U.S. 607 — 56

Cases—Continued
Contractors Association of Eastern Pennsylvania v. *Secretary of Labor*, 442 F. 2d 159, certiorari denied, 404 U.S. 854 — Page 46
Cort v. *Ash*, 422 U.S. 66 — 36, 53–54, 55
Debs, In re, 158 U.S. 564 — 53
Department of the Air Force v. *Rose*, 425 U.S. 352 — 14, 18, 19
Duke Power Co. v. *Carolina Environmental Study Group, Inc.*, No. 77–262, decided June 26, 1978 — 55
Dunlop v. *Bachowski*, 421 U.S. 560 — 56
Environmental Protection Agency v. *Mink*, 410 U.S. 73 — 13, 18, 19
Exchange National Bank v. *Abramson*, 295 F. Supp. 87, appeal dismissed, 407 F. 2d 865 — 38
Farkas v. *Texas Instruments, Inc.*, 375 F. 2d 629, certiorari denied, 389 U.S. 977 — 46
Federal Communications Commission v. *American Broadcasting Co.*, 347 U.S. 284 — 44
Federal Communications Commission v. *Pacifica Foundation*, No. 77–528, decided July 3, 1978 — 44
Federal Communications Commission v. *Schreiber*, 381 U.S. 279 — 31, 48, 49
Federal Housing Administration v. *The Darlington, Inc.*, 358 U.S. 84 — 26
Free v. *Bland*, 369 U.S. 663 — 38
General Dynamics Corp. v. *Marshall*, 572 F. 2d 1211, petition for a writ of certiorari pending, No. 78–79 — 26, 39
General Services Administration v. *Benson*, 415 F. 2d 878 — 38–39
Isbrandtsen-Moller Co. v. *United States*, 300 U.S. 139 — 49
Jones v. *Rath Packing Co.*, 430 U.S. 519 — 38
Laughlin v. *United States*, 474 F. 2d 444 — 38
Linda R. S. v. *Richard D.*, 410 U.S. 614 — 53
Lorillard v. *Pons*, No. 76–1346, decided February 27, 1978 — 26
Maryland Casualty Co. v. *United States*, 251 U.S. 342 — 38
Massachusetts Trustees v. *United States*, 377 U.S. 235 — 50
Mitchell v. *Robert DeMario Jewelry, Inc.*, 361 U.S. 288 — 36
Moore-McCormack Lines, Inc. v. *I.T.O. Corp of Baltimore*, 508 F. 2d 945 — 26

Cases—Continued

	Page
Morton v. *Ruiz*, 415 U.S. 199	47
National Labor Relations Board v. *Robbins Tire & Rubber Co.*, No. 77-911, decided June 15, 1978	14, 19
National Labor Relations Board v. *Sears, Roebuck & Co.*, 421 U.S. 132	13, 20
National Labor Relations Board v. *Wyman-Gordon Co.*, 394 U.S. 759	50
National Parks and Conservation Association v. *Morton*, 498 F. 2d 765	31
National Railroad Passenger Corp. v. *National Association of Railroad Passengers*, 414 U.S. 453	34
Norwegian Nitrogen Products Co. v. *United States*, 288 U.S. 294	49
Old Dominion Branch No. 496 National Association of Letter Carriers, AFL-CIO v. *Austin*, 418 U.S. 264	46
Open America v. *Watergate Special Prosecution Force*, 547 F. 2d 605	58
Pennzoil Co. v. *Federal Power Commission*, 534 F. 2d 627	26
Pleasant Hill Bank v. *United States*, 58 F.R.D. 97	38
Porter v. *Warner*, 328 U.S. 395	36
Public Utilities Commission of California v. *United States*, 355 U.S. 534	38
Red Lion Broadcasting Co. v. *Federal Communications Commission*, 395 U.S. 367	26
Regional Rail Reorganization Act Cases, 419, U.S. 102	25, 55
Renegotiation Board v. *Bannercraft Clothing Co.*, 415 U.S. 1	14, 30, 36
Renegotiation Board v. *Grumman Aircraft Engineering Corp.*, 421 U.S. 168	13, 60
Searborough v. *United States*, 431 U.S. 563	44
Sears, Roebuck & Co. v. Eckerd, 575 F. 2d 1197, petition for a writ of certiorari pending, No. 78-97	26, 39
Securities Investor Protection Corp. v. *Barbour*, 421 U.S. 412	34
Smith v. *United States*, 305 F. 2d 197	39
Southern Illinois Builders Association v. *Ogilvie*, 327 F. Supp. 1154, affirmed, 471 F. 2d 680	46
Texas & Pacific R. Co. v. *Rigsby*, 241 U.S. 33	35, 54
United States v. *Carlo Bianchi & Co.*, 373 U.S. 709	56

Cases—Continued

	Page
United States v. *Mersky*, 361 U.S. 431	38
United States v. *New Orleans Public Service, Inc.*, 553 F. 2d 459, on rehearing, 559 F. 2d 30, vacated on other grounds, June 5, 1978 (No. 77-497)	46
United States v. *Nixon*, 418 U.S. 683	38
United States v. *Pennsylvania Industrial Chemical Corp.*, 411 U.S. 655	47
United States v. *Wise*, 370 U.S. 405	25
Westinghouse Electric Corp. v. *Nuclear Regulatory Commission*, 555 F. 2d 82	39
Westinghouse Electric Corp. v. *Schlesinger*, 542 F. 2d 1190, certiorari denied *sub nom. Brown* v. *Westinghouse Electric Corp.*, 431 U.S. 924	26
Statutes and regulations:	
Act of June 25, 1948, Section 1905, 62 Stat. 791	41
Administrative Procedure Act:	
5 U.S.C. 553	47
5 U.S.C. 702	56, 61
Section 10(e), now 5 U.S.C. 706(2)(A)	13, 15, 17, 56, 57, 61
Section 3, 5 U.S.C. (1964 ed.) 1002	18
Civil Rights Act of 1964, Section 709(e), 78 Stat. 262, as amended, 42 U.S.C. 2000e-8(e)	10, 11, 12
Freedom of Information Act:	
5 U.S.C. 552	2
5 U.S.C. 552(a)	2, 33
5 U.S.C. 552(a)(3)	2, 33, 47
5 U.S.C. 552(a)(4)(A)	33
5 U.S.C. 552(a)(4)(B)	33
5 U.S.C. 552(a)(4)(F)	33
5 U.S.C. 552(a)(6)(A)	58
5 U.S.C. 552(a)(6)(A)(i)	58
5 U.S.C. 552(b)	2, 9, 20, 33, 59
5 U.S.C. 552(b)(3)	3, 10, 14, 37
5 U.S.C. 552(b)(4)	3, 10, 17, 27, 28, 29, 31, 57, 61
5 U.S.C. 552(b)(5)	10, 30
5 U.S.C. 552(b)(6)	3, 14, 27, 28, 29
5 U.S.C. 552(b)(7)	10, 14
5 U.S.C. 552(d)	25

Statutes and regulations—Continued — Page

Privacy Act of 1974, 5 U.S.C. 552a — 34
5 U.S.C. 552a(a)(4) — 35
5 U.S.C. 552a(b)(2) — 35
5 U.S.C. 552a(d)(1) — 35
5 U.S.C. 552a(g)(1)(B) — 35
5 U.S.C. 552a(g)(3)(A) — 35
5 U.S.C. 552a(g)(4) — 34, 35
Tariff Act of 1894, 28 Stat. 509 — 40
Trade Secrets Act, 18 U.S.C. 1905 — *Passim*
Tucker Act, 28 U.S.C. 1491 — 55
Rev. Stat. of 1878, Section 3167 — 37, 38, 40, 41, 42–43
13 Stat. 238 — 40
39 Stat. 756, 19 U.S.C. (1940 ed.) 1335 — 41
52 Stat. 8, 15 U.S.C. (1940 ed.) 176a — 42
72 Stat. 547 — 50
88 Stat. 1561 — 23
Pub. L. 94–455, Title XII, Section 1202(h)(3), 90 Stat. 1686, 1688 — 43
5 U.S.C. 301 — 4, 16, 45, 49, 50, 51
18 U.S.C. 216 — 38
18 U.S.C. 1464 — 44
26 U.S.C. 7213(b) — 43
44 U.S.C. 3508 — 10
7 C.F.R. 1.1 — 27
10 C.F.R. 9.10(c) — 27
10 C.F.R. 202.9(b) — 27
15 C.F.R. Part 4, App. A, Section 5.02(d)(1) — 27
16 C.F.R. 4.11(a)(1)(iv)(A) — 27
16 C.F.R. 1015.15 — 27
22 C.F.R. 6.2(a) — 27
22 C.F.R. 6.6 — 27
24 C.F.R. 15.21 — 27
28 C.F.R. 16.1(a) — 27
29 C.F.R. 70.11(b) — 27
29 C.F.R. 70.21 — 10, 48, 49
29 C.F.R. 70.21(a) — 11, 43
29 C.F.R. 70.22 — 10
29 C.F.R. 70.24 — 10
29 C.F.R. 70.31 — 10
29 C.F.R. 70.71 — 7, 45, 49

Statutes and regulations—Continued — Page

31 C.F.R. 1.2(c)(4) — 27
32 C.F.R. 286.4(b) — 27
40 C.F.R. 2.101(a) — 27
40 C.F.R. 2.119(b) — 27
41 C.F.R. 60–1.2 — 5
41 C.F.R. 60–1.6 — 5
41 C.F.R. 60–1.7 — 5
41 C.F.R. 60–1.24(c) — 7
41 C.F.R. 60–1.24(d) — 7
41 C.F.R. 60–1.40 — 6
41 C.F.R. 60–2.1 — 6
41 C.F.R. 60–40.1 — 7, 46, 48
41 C.F.R. 60–40.1 to 60–40.4 — 4
41 C.F.R. 60–40.2(a) — 7, 31
41 C.F.R. 60–40.2(b) — 7
41 C.F.R. 60–40.3(a) — 10
41 C.F.R. 60–40.3(a)(1) — 8
41 C.F.R. 60–40.3(a)(2) — 8
41 C.F.R. 60–40.3(a)(5) — 8
41 C.F.R. 60–60.2(a) — 6
41 C.F.R. 60–60.3 — 6
41 C.F.R. 60–60.4(d) — 59
43 C.F.R. 2.13(d) — 27
45 C.F.R. 5.74 — 27
47 C.F.R. 0.457 — 27
47 C.F.R. 0.461 — 27
49 C.F.R. 7.61 — 27

Miscellaneous:

66 Cong. Globe, 38th Cong., 1st Sess. (1864) — 40
7 Cong. Rec. 4005–4006 (1878) — 41
26 Cong. Rec. 6893 (1894) — 40
104 Cong. Rec. 6549 (1958) — 50
104 Cong. Rec. 6550 (1958) — 51
104 Cong. Rec. 6562 (1958) — 51, 52
104 Cong. Rec. 6569 (1958) — 52, 53
120 Cong. Rec. 17016 (1974) — 24
Executive Order 11246, 30 Fed. Reg. 12319 — 5, 7, 16, 45
Executive Order 11375, 32 Fed. Reg. 14303 — 5
38 Fed. Reg. 3192–3193 — 45
38 Fed. Reg. 3193 — 47, 48
41 Op. Atty. Gen. 166 (1953) — 38

Miscellaneous—Continued Page
41 Op. Atty. Gen. 221 (1955) ---------- 38
Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act (1967) ---------- 22, 28
Chafee and Re, *Equity* (5th ed. 1967) ---------- 53
Clement, *The Rights of Submitters to Prevent Agency Disclosure of Confidential Business Information: The Reverse Freedom of Information Act Lawsuit*, 55 Tex. L. Rev. 587 (1977) ---------- 14, 21, 43
Comment, *The Philadelphia Plan: A Study in the Dynamics of Executive Power*, 39 U. Chi. L. Rev. 723 (1972) ---------- 46
Davis, *The Information Act: A Preliminary Analysis*, 34 U. Chi. L. Rev. 761 (1967) ---------- 21
Freedom of Information Committee, *Freedom of Information Case List* (1978 ed.) ---------- 14
Freedom of Information: Hearings on S. 1666 and S. 1663 Before the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, United States Senate, 88th Cong., 1st Sess. ( ) ---------- 29
H.R. Rep. No. 304, 80th Cong., 1st Sess. (1947) ------ 41
H.R. Rep. No. 1497, 89th Cong., 2d Sess. (1966) ------ 20, 28
H.R. Rep. No. 92-1419, 92d Cong., 2d Sess. (1972) -- 22, 23, 28
H.R. Rep. No. 93-221, 93d Cong., 1st Sess. (1973) ---- 24
H.R. Rep. No. 93-876, 93d Cong., 2d Sess. (1974) ---- 23, 24
H.R. Conf. Rep. No. 94-1515, 94th Cong., 2d Sess. (1976) ---------- 44
H.R. Rep. No. 95-1382, 95th Cong., 2d Sess. (1978) ---------- 14, 25, 30
Note, *Protection From Government Disclosure—The Reverse-FOIA Suit*, 1976 Duke L. J. 330 ---------- 21-22
Note, *Reverse-Freedom of Information Act Suits: Confidential Information in Search of Protection*, 70 Nw. L. Rev. 995 (1976) ---------- 22
Project, *Government Information and the Rights of Citizens*, 73 Mich. L. Rev. 971 (1975) ---------- 21
S. Rep. No. 93-854, 93d Cong., 2d Sess. (1974) ------ 24, 28
S. Rep. No. 813, 89th Cong., 1st Sess. (1966) ---------- 21, 28
S. Rep. No. 1219, 88th Cong., 2d Sess. (1964) ---------- 21
S. Rep. No. 1621, 85th Cong., 2d Sess. (1958) ---------- 50

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-922

CHRYSLER CORPORATION, PETITIONER

v.

HAROLD BROWN, SECRETARY OF DEFENSE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–42a) is reported at 565 F.2d 1172. The opinion of the district court (Pet. App. 43a–57a) is reported at 412 F. Supp. 171.

JURISDICTION

The judgment of the court of appeals (Pet. App. 58a–59a) was entered on September 26, 1977. The petition for a writ of certiorari was filed on December 27, 1977 (a Tuesday following a holiday) and was granted on March 6, 1978. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

271-103—78——2

QUESTIONS PRESENTED

1. Whether a private party has a right, under the Freedom of Information Act, to prevent a federal agency from disclosing materials that are exempt from mandatory disclosure under the Act.

2. Whether 18 U.S.C. 1905 requires an injunction against the disclosure, authorized by agency regulations, of assertedly confidential information submitted to a federal agency.

3. Whether judicial review of an agency's decision to disclose assertedly confidential information should be conducted on the administrative record and governed by the standards of review in the Administrative Procedure Act.

STATUTES AND REGULATIONS INVOLVED

1. The Freedom of Information Act, 5 U.S.C. 552, provides in pertinent part:

> (a) Each agency shall make available to the public information as follows:
>
> * * * * *
>
> (3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.
>
> * * * * *

> * * * * *
>
> (b) This section does not apply to matters that are—
>
> (3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;
>
> (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;
>
> * * * * *
>
> (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

2. 18 U.S.C. 1905 provides:

> Whoever, being an officer or employee of the United States or of any department or agency thereof, publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income,

profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined not more than $1,000, or imprisoned not more than one year, or both; and shall be removed from office or employment.

3. 5 U.S.C. 301 provides:

The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public.

4. The pertinent disclosure regulations of the Office of Federal Contract Compliance Programs, 41 C.F.R. 60–40.1 to 60–40.4, are reproduced at Pet. App. 62a–65a.

STATEMENT

1. Petitioner has contracts with a number of federal agencies, including the Department of Defense (App. 132–133). As a condition of doing business with the federal government, petitioner agreed not to discriminate against any of its employees or applicants for employment on the basis of race, color, religion, sex, or national origin. In addition, petitioner agreed to take affirmative action to ensure that applicants and employees are treated in a non-discriminatory

fashion. These agreements are included in each contract between petitioner and any federal agency, as is required by Executive Order 11246, 30 Fed. Reg. 12319, as amended by Executive Order 11375, 32 Fed. Reg. 14303.

Petitioner must submit an annual Employer Information Report, known as an EEO–1 report, to the Defense Supply Agency, a branch of the Department of Defense.[1] This report helps the Agency to monitor petitioner's compliance with its contract provisions. The EEO–1 report states the number of women and minority group members that petitioner employs in its domestic operations as a whole and in each of its domestic facilities.[2] 41 C.F.R. 60–1.7. In addition,

[1] The Defense Supply Agency has recently been renamed the Defense Logistics Agency. We refer to it here by its former name, which was in use throughout the period before this litigation began.

[2] The reports are submitted to the Defense Supply Agency as the result of a series of delegations authorized by Executive Order 11246 and by Department of Labor Regulations. The Executive Order delegates responsibility for administering contractors' equal employment agreements to the Secretary of Labor (Section 201), and further provides that the Secretary of Labor may redelegate his functions under the order (except for his authority to promulgate general rules and regulations) to any other executive agency (Section 401). The Secretary has delegated the administration of the Order to the Office of Federal Contract Compliance Programs (OFCCP), an office within the Department of Labor (41 C.F.R. 60–1.2). The Director of the OFCCP has in turn designated various federal agencies as "compliance agencies," having primary responsibility for assuring contractors' compliance with their equal employment responsibilities (41 C.F.R. 60–1.6). The Defense Supply Agency has been designated as petitioner's compliance agency.

petitioner must prepare and make available to the Agency on request written Affirmative Action Programs, which detail the steps petitioner has taken and intends to take to guarantee equal employment opportunity for employees and job applicants in petitioner's domestic facilities. 41 C.F.R. 60–1.40, 60–2.1, 60–60.2(a) (App. 133–135). The Affirmative Action Programs contain information on staffing patterns, pay scales, actual and anticipated shifts in employment, and related employment matters. They also contain goals and projections for employment of minority group members and women, as well as analyses by petitioner of its success in meeting its objectives (App. 134).

The Defense Supply Agency conducts periodic "compliance reviews" of the employment practices of those contractors for which it serves as the compliance agency. In the course of these reviews, the Agency examines the contractors' EEO–1 forms and Affirmative Action Programs, and it conducts on-site inspections of their facilities. Following each compliance review, the Agency prepares a "Compliance Review Report," which contains information supplied by the contractor, an analysis of its performance in meeting its equal employment responsibilities and goals, and, if necessary, recommendations for sanctions or corrective measures. 41 C.F.R. 60–60.3. The Agency also is responsible for investigating and seeking to resolve complaints of violations of the Executive Order. 41 CFR. 60–1.24(c). It must file a "Complaint Investigation Report" with the OFCCP following its investigation of each such complaint. 41 C.F.R. 60–1.24(d).

2. Under the authority of Executive Order 11246 and 29 C.F.R. 70.71, the Secretary of Labor has promulgated regulations providing for public access under certain circumstances to records of the OFCCP and its various compliance agencies. The regulations, which are designed to "implement * * * the Freedom of Information Act," provide that "[i]t is the policy of the OFCC[P] to disclose information to the public and to cooperate with other public agencies as well as private parties seeking to eliminate discrimination in employment." 41 C.F.R. 60–40.1. In accordance with this policy, the regulations provide that the OFCCP will disclose records "obtained or generated pursuant to Executive Order 11246 (as amended) * * * if it is determined that the requested inspection or copying furthers the public interest and does not impede any of the functions of the OFCC[P] or the Compliance Agencies, except in the case of records disclosure of which is prohibited by law." 41 C.F.R. 60–40.2(a). The regulations thus effectively provide that the OFCCP and the compliance agencies will not ordinarily withhold information on the basis of the exemptions from mandatory disclosure under the Freedom of Information Act.

The regulations call for the disclosure of "all contract compliance documents," 41 C.F.R. 60–40.2(b),

with certain exceptions. The exceptions include: (1) the portions of Affirmative Action Programs "which would be confidential commercial or financial information" because they indicate that a contractor plans major changes in its personnel requirements, which have not been announced to the public; (2) the portions of Affirmative Action Programs that describe staffing patterns or pay scales, if their release "would injure the business or financial position of the contractor, would constitute a release of confidential financial information of an employee or would constitute an unwarranted invasion of the privacy of an employee"; and (3) compliance investigation files, including the standard Compliance Review Report, to the extent that the files contain "trade secrets and confidential commercial or financial information" or certain other types of sensitive materials. 41 C.F.R. 60–40.3(a)(1), (2), (5). Each of these records "should be withheld," according to the regulations, "if it is determined that the requested inspection or copying does not further the public interest and might impede the discharge of any of the functions of the OFCC[P] or the Compliance Agencies." 41 C.F.R. 60–40.3(a).

3. In 1975 the Defense Supply Agency received two Freedom of Information Act (FOIA) requests for agency records pertaining to petitioner. The first request, submitted by a person who had filed a racial discrimination suit against petitioner, sought disclosure of the 1974 Affirmative Action Program and

an October 1974 Complaint Investigation Report for petitioner's Newark, Delaware, assembly facility (App. 104–107). The second request, submitted by an attorney for the plaintiff in a pending sex discrimination action against the company, sought disclosure of the current Affirmative Action Program and Compliance Review Report for petitioner's Hamtramck, Michigan, plant (App. 101).

In each instance, the Agency informed petitioner about the request and provided petitioner an opportunity to voice any objections it might have to disclosure of the materials (App. 95, 114). Petitioner objected to disclosure of the materials on various grounds, including the assertion that the materials contained confidential corporate information, the release of which would adversely affect petitioner's business interests (App. 76–81, 84–87, 118–121).

After reviewing the materials and petitioner's objections, the Agency concluded that certain portions of the requested materials should be withheld, but that other portions should be disclosed under the OFCCP's disclosure regulations (App. 61–66, 122–123). As to the materials that were withheld, the Agency invoked the exemptions from mandatory disclosure in the FOIA, 5 U.S.C. 552(b) (App. 61–66, 122–123).

4. Before the Agency disclosed the materials relating to the Delaware plant, petitioner brought this action in the United States District Court for the District of Delaware, seeking an injunction and

271–103—78——3

declaratory judgment barring the release of the materials. The court issued a temporary restraining order prohibiting release of the records (App. 2–3). Prior to the disclosure of the materials relating to the Michigan plant, petitioner amended its complaint to include those documents within its prayer for injunctive relief (App. 4–17). Petitioner obtained a temporary restraining order barring release of those records as well (App. 54–57, J.A. 112–113),[3] and both temporary restraining orders were extended until the determination of the case on the merits (J.A. 7–8, 10–11, 115, 124).

Petitioner's complaint alleged that disclosure of any portion of the Affirmative Action Programs, the EEO–1s, or any Complaint Investigation Report or Compliance Review Report pertaining to any of its facilities is prohibited by exemptions 3, 4, 5, and 7 to the Freedom of Information Act, 5 U.S.C. 552(b)(3), (4), (5), (7); by 18 U.S.C. 1905; by Section 709(e) of the Civil Rights Act of 1964, 78 Stat. 264, as amended, 42 U.S.C. 2000e–8(e); by 44 U.S.C. 3508; and by various Department of Labor Regulations, 29 C.F.R. 70.21, 70.22, 70.24, 70.31, and 41 C.F.R. 60–40.3(a).

After a *de novo* evidentiary hearing, the district court found that, of all the information the Agency proposed to release, only the "manning tables" for petitioner's Delaware plant fell within any of the exemptions to mandatory disclosure under the FOIA (Pet. App. 49a–52a). The "manning tables" were described as lists of petitioner's internally used job titles and the number of persons who performed each job (*id.* at 50a). Because it concluded that the "manning tables" contained confidential commercial information, the release of which could cause petitioner substantial competitive harm, the court held that the tables are exempt from mandatory disclosure under exemption 4 of the Freedom of Information Act (*id.* at 49a–52a).

[3] "J.A." refers to the joint appendix in the court of appeals.

Having found that the information in the manning tables falls within exemption 4, the court held that the FOIA is therefore inapplicable. Nonetheless, the court held that disclosure of the materials is prohibited by a Department of Labor regulation, 29 C.F.R. 70.21(a), which forbids the Agency to disclose information that would expose the disclosing employee to criminal liability under 18 U.S.C. 1905 (Pet. App. 52a–53a). That statute makes it unlawful for a federal employee to disclose certain types of confidential information "to any extent not authorized by law." Because it had found that the manning tables contain confidential commercial statistical data, the court concluded that disclosure of the tables would subject a federal employee to criminal liability under 18 U.S.C. 1905, and that the disclosure is therefore prohibited by the Department of Labor regulation.[4]

Accordingly, the district court enjoined respondents from disclosing the "manning table" portions of the two Affirmative Action Programs in question (Pet. App. 67a). The court concluded that the remainder of

[4] The court rejected petitioner's argument that disclosure is barred by 42 U.S.C. 2000–8(e) (Pet. App. 55a).

the requested materials, which it found do not contain confidential commercial or financial information, are not protected from public disclosure and could therefore be released by the Agency (*id.* at 49a).

5. The court of appeals held that neither exemption 4 of the FOIA nor 18 U.S.C. 1905 prohibits disclosure of any of the materials at issue. The FOIA exemptions, the court held, are permissive rather than mandatory, and an agency is therefore not barred from disclosing materials that fall within one of the exemptions. The court of appeals pointed out that 18 U.S.C. 1905 bars federal officers or employees from disclosing confidential business information only if the disclosure is "not authorized by law." The OFCCP regulations permit disclosure of materials in the possession of compliance agencies, and the court held that those regulations are "authorization by law" within the scope of 18 U.S.C. 1905. Consequently, it concluded, Section 1905 does not bar disclosure in this case (Pet. App. 22a–25a, 27a–30a). For the same reason, the court held that disclosure would not violate Department of Labor regulations, which, like Section 1905, prohibit only disclosures "not authorized by law" (Pet. App. 36a). In any event, the court held that neither the FOIA nor Section 1905 establishes a private cause of action under which petitioner could seek injunctive or declaratory relief (Pet. App. 25a, 30a–31a).[5]

[5] The court also rejected petitioner's contention that disclosure of the Affirmative Action Programs and EEO–1s is prohibited by 42 U.S.C. 2000e–8(e) (Pet. App. 31a–33a). Petitioner has not challenged that aspect of the court of appeals' decision in this Court.

Finally, the court held that in reviewing an agency's decision to release assertedly confidential materials, the district court should not conduct a *de novo* review of the agency's action; it instead must examine the administrative record to determine whether the agency's decision to disclose is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 6 U.S.C. 706(2)(A). Finding the record in this case inadequate to permit meaningful judicial review under this standard, the court remanded the case to the Agency for further proceedings (Pet. App. 36a–40a).

INTRODUCTION AND SUMMARY OF ARGUMENT

Six of the seven Freedom of Information Act (FOIA) cases that this Court has decided have involved the exemptions to the Act's disclosure requirements. In each of these six cases, a private party sought records from a federal agency, and the agency resisted disclosure, asserting a right to withhold on the basis of one or more of the exemptions.[6]

Here the opposite is the case. A federal agency preparing to disclose materials requested under the

[6] The six cases are *Environmental Protection Agency* v. *Mink*, 410 U.S. 73 (exemption 1); *National Labor Relations Board* v. *Sears, Roebuck & Co.*, 421 U.S. 132 (exemptions 5 and 7); *Renegotiation Board* v. *Grumman Aircraft Engineering Corp.*, 421 U.S. 168 (exemption 5); *Administrator, Federal Aviation Administra-*

FOIA was sued by a private party seeking to bar disclosure of the materials. Cases such as this one, in which private parties have sought to block the release of federal agency records obtained from or pertaining to them commonly have been referred to as "reverse FOIA" cases.[7]

The basic question posed in most "reverse FOIA" cases is whether an agency, as a matter of discretion, may disclose records that it would be entitled to withhold under one or more of the exemptions to the FOIA. We submit that an agency may make such discretionary disclosures so long as the disclosures are not contrary to some law—other than the FOIA—that independently prohibits disclosure. Because decisions to disclose information are final agency action, how-

tion v. *Robertson*, 422 U.S. 255 (exemption 3); *Department of the Air Force* v. *Rose*, 425 U.S. 352 (exemptions 2 and 6); *National Labor Relations Board* v. *Robbins Tire & Rubber Co.*, No. 77-911, decided June 15, 1978 (exemption 7). The seventh case, *Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U.S. 1, involved the question whether a district court could stay proceedings before the Renegotiation Board pending resolution of a FOIA claim presented to the Board.

[7] The first "reverse FOIA" case was decided in 1973. In May 1978 more than 100 such cases were pending. Almost all of them involved business documents. See H.R. Rep. No. 95-1382, 95th Cong., 2d Sess. 53-54 (1978). A catalogue of the leading "reverse FOIA" cases can be found in Freedom of Information Committee, *Freedom of Information Case List* 68-71 (1978 ed.), and Clement, *The Rights of Submitters to Prevent Agency Disclosure of Confidential Business Information: The Reverse Freedom of Information Act Lawsuit*, 55 Tex. L. Rev. 587, 589-590 n. 7 (1977).

ever, they are subject to judicial review, on the administrative record, under the standards of Section 10(e) of the Administrative Procedure Act, now 5 U.S.C. 706(2)(A).

I

The Freedom of Information Act is a disclosure statute, not a withholding statute. Although it provides that agencies may refuse to disclose records falling within one or more of nine specific exemptions, it does not require the agency withhold any record. Congressional concern for confidentiality of both business and personal information underlay the decision to add exemptions 4 and 6 to the Act. But both the language of the Act and its legislative history make clear that those exemptions, like the other seven exemptions, were intended to be permissive rather than mandatory. Subsection (b) of the FOIA provides that the Act "does not apply" to materials that fall within the exemptions. Accordingly, the FOIA does not forbid agencies from disclosing exempt materials. Unless some other statute forbids disclosure, agencies are free to disclose any information in their possession.

II

The second statute on which petitioner founds its asserted right to bar the proposed disclosures is the Trade Secrets Act, 18 U.S.C. 1905. That criminal statute prohibits disclosure by agency employees

and officers of trade secrets and other confidential business information except as "authorized by law."

Even if the materials at issue in this case fall within the reach of the Trade Secrets Act, their disclosure would not violate that Act, since disclosure was "authorized by law." Court orders, court rules, or agency regulations may provide the authorization by law of which Section 1905 speaks. Since the OFCCP disclosure regulations authorize release of assertedly confidential records in appropriate circumstances, disclosure of the records involved in this case is "authorized by law" within the meaning of Section 1905.

The OFCCP disclosure regulations were promulgated under the authority of Executive Order 11246, which provides that the Secretary of Labor may issue regulations he deems necessary and appropriate to the enforcement of the policies of the Order. In addition to that authority, the regulations are valid under the executive department "housekeeping" statute, 5 U.S.C. 301, which permits the executive departments to promulgate appropriate regulations to govern the "custody, use, and preservation of its records, papers, and property."

Even if the disclosure of records in a particular case violates the Trade Secrets Acts, a private plaintiff such as petitioner would have no right of action under that Act to prevent disclosure of the records. Instead, the private plaintiff's remedy would be through judicial review of the agency's action under the Administrative Procedure Act. A private civil cause of action rarely arises by implication from a criminal statute. Nothing in the language or legislative history of Section 1905 suggests congressional intent to create a private cause of action, and Section 1905 was not designed for the special benefit of a particular class. Accordingly, Section 1905 does not create a right of action under which private parties may seek to enjoin impending violations of that Act.

III

Petitioner may obtain review of the disclosures under the Administrative Procedure Act. Review under that Act, however, is conducted on the basis of the administrative record, and agency action must be upheld unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A).

Petitioner contends that review in the district court should be *de novo*; it maintains that agency fact-finding procedures are inadequate to establish whether particular business information is confidential within the meaning of exemption 4 and whether, on balance, the public interest would be served by its disclosure. Yet Congress has concluded that the short time period within which an agency must determine whether particular records must be disclosed is sufficient; moreover, once the agency has determined that records are exempt, the stringent time restrictions of the FOIA

271-103—78——4

do not apply. The inquiry whether the records should be released as a discretionary matter can be made within whatever period the agency deems sufficient to consider all issues bearing on the propriety of disclosure. If the agency's decision is not based on a fair consideration of the relevant factors, that decision can be challenged on review as being "arbitrary and capricious." Possible infirmities in the agency proceedings in a particular case, however, do not justify the highly unusual remedy of *de novo* review in the district courts.

ARGUMENT

I

THE FREEDOM OF INFORMATION ACT DOES NOT AUTHORIZE A COURT TO PREVENT A FEDERAL AGENCY FROM RELEASING AGENCY RECORDS

A. THE FREEDOM OF INFORMATION ACT EXEMPTIONS ARE PERMISSIVE RATHER THAN MANDATORY

1. The FOIA "does not apply to" exempted materials

The basic policy of the FOIA is "disclosure, not secrecy." *Department of the Air Force* v. *Rose,* 425 U.S. 352, 361. The statute replaced former Section 3 of the Administrative Procedure Act, 5 U.S.C. (1964 ed.) 1002, which "was generally recognized as falling far short of its disclosure goals and had come to be looked upon more as a withholding statute than a disclosure statute." *Environmental Protection Agency* v. *Mink,* 410 U.S. 73, 79. In sharp contrast to Section 3, the FOIA established a presumption in favor of disclosure and created "a judicially enforceable public

right to secure * * * information from possibly unwilling official hands." *Id.* at 80; see *National Labor Relations Board* v. *Sears, Roebuck & Co.,* 421 U.S. 132, 136; *National Labor Relations Board* v. *Robbins Tire & Rubber Co.,* No. 77–911, decided June 15, 1978; slip op. 21.

Recognizing that there are legitimate reasons for agencies to conclude that certain types of records should not be released, Congress created nine exemptions from compelled disclosure. In its first encounter with the FOIA, this Court characterized the exemptions as permissive, noting that they were intended "to set up concrete, workable standards for determining whether particular material may be withheld or must be disclosed" (*Environmental Protection Agency* v. *Mink, supra,* 410 U.S. at 79), and that they represent "the types of information that the Executive Branch must have the option to keep confidential, if it so chooses" (*id.* at 80). See also *Administrator, Federal Aviation Administration* v. *Robertson,* 422 U.S. 255, 262. More recently, the Court has made the same observation in somewhat different terms, noting that the Act's exemptions are "exemptions from *compelled disclosure.*" *Department of the Air Force* v. *Rose, supra,* 425 U.S. at 361 (emphasis added). The exemptions thus provide a harbor from forced disclosure in certain limited situations if, but only if, the agency choses to invoke them.

The Court's construction of the statute in *Mink* is practically compelled by the language Congress chose.

Section 552(b) states that the statute "does not apply to matters" described by the nine exemptions. See *National Labor Relations Board* v. *Sears, Roebuck & Co., supra,* 421 U.S. at 147–148. If the FOIA means what it so plainly says, then it leaves federal agencies with whatever authority and obligations other statutes create concerning the exempted matters. The FOIA never requires withholding of exempted materials because it "does not apply" to them.

2. The legislative history shows that the exemptions give officials discretion concerning release

The legislative history and the contemporaneous and subsequent construction of the FOIA support our reading of the statutory language.

Both the House and Senate Reports on the Act described the exemptions in permissive terms. The House Report stated that the exemptions would provide "workable standards for the categories of records which may be exempt from public disclosure," and it added that because there may be legitimate reasons for non-disclosure, the Act "is designed to permit non-disclosure in such cases." H.R. Rep. No. 1497, 89th Cong., 2d Sess. 2, 6 (1966). The Senate Report, similarly, explained that the exemptions list the "specific and limited types of information that may be withheld;" it described the policy of the Act as being that all agency records "are to be made available to the public by publication or otherwise unless explicitly allowed to be kept secret" by one of the

exemptions. S. Rep. No. 813, 89th Cong., 1st Sess. 5, 10 (1966).[8]

Shortly after the Act became effective, Professor Kenneth Culp Davis, a leading authority on the Act, wrote:

> The Act contains no provision forbidding disclosure. It requires disclosure of all records except what is "specially" [exempted] within the nine exemptions and other provisions. The exemptions protect against required disclosure, not against disclosure. The Act leaves officers free to disclose or withhold records covered by the exemptions, but they may then be governed by other statutory law, by the common law, by executive privilege, by executive orders, or by agency-made law in the form of regulations, orders, or instructions.

Davis, *The Information Act: A Preliminary Analysis,* 34 U. Chi. L. Rev. 761, 766 (1967). Other commentators have reached the same conclusion. See Clement, *The Rights of Submitters To Prevent Agency Disclosure of Confidential Business Information: The Reverse Freedom of Information Act Lawsuit,* 55 Tex. L. Rev. 587, 591–602 (1977); Project; *Government Information and the Rights of Citizens,* 73 Mich. L. Rev. 971, 1158–1159 (1975); Note, *Protection From*

[8] In 1964, two years before the FOIA was enacted, the Senate Judiciary Committee published its first report on the proposed legislation. S. Rep. No. 1219, 88th Cong., 2d Sess. (1964). That Committee report stated (*id.* at 15):

"[A]ll materials of the Government are to be made available to the public by publication or otherwise unless explicitly *allowed* to be kept secret by one of the exemptions * * *" [emphasis added].

Government Disclosure—The Reverse-FOIA Suit, 1976 Duke L. J. 330, 333–339; Note, *Reverse-Freedom of Information Act Suits: Confidential Information in Search of Protection,* 70 Nw. U. L. Rev. 995, 1007 (1976).

Similarly, in a memorandum explaining the purpose and operation of the Act to the federal agencies, the Attorney General advised that:

> Agencies should also keep in mind that in some instances the public interest may best be served by disclosing, to the extent permitted by other laws, documents which they would be authorized to withhold under the exemptions.

Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act 2–3 (1967).

Since the passage of the FOIA, Congress has underscored the permissive nature of the exemptions in the course of its oversight of the operation of the Act. In September 1972 the House Committee on Government Operations submitted a report of its in-depth study of the administration of the then six-year-old statute. H.R. Rep. No. 92–1419, 92d Cong., 2d Sess. (1972). The report stated that "[w]ithholding of information by government under the act is permissive not mandatory * * *." *Id.* at 3, 14. The report criticized the Cost of Living Council and its subsidiary units for adopting regulations flatly prohibiting disclosure of exempt information. Noting that the regulations were amended to provide for the release of otherwise

exempt information where disclosure would be in the public interest, the report applauded the revisions as bringing the regulations "into conformity with the spirit of the Freedom of Information Act." *Id.* at 14–15.

The House Committee's 1972 Report provided the groundwork for the extensive revisions of the FOIA in 1974. See. H.R. Rep. No. 93–876, 93d Cong., 2d Sess. 4 (1974). The 1974 amendments (88 Stat. 1561) were the product of a full-scale legislative review of the administration and operation of the Act. Where Congress determined that the agencies or the courts were administering or interpreting the Act in a manner inconsistent with the original legislative intent or contrary to the Act's basic purposes, Congress adopted corrective measures.[9] On the other hand, where the congressional review disclosed that the agencies had administered the Act in a manner consistent with the legislative purpose, Congress left the Act unchanged.

Both the Senate and the House Reports on the 1974 amendments reflected the understanding that the exemptions were permissive rather than mandatory. The Senate Report, restating the point made by the Attorney General's 1967 memorandum, explained:

---

[9] For example, in the 1974 amendments Congress removed the absolute ban on *in camera* inspection of certain materials; it amended exemptions 1 and 7 to restore what it deemed to be the original congressional intent; and it added detailed procedural provisions governing the administrative handling of disclosure requests.

> Congress did not intend the exemptions in the FOIA to be used either to prohibit disclosure of information or to justify automatic withholding of information. Rather, they are only *permissive*. They merely mark the outer limits of information that *may* be withheld where the agency makes a specific affirmative determination that the public interest and the specific circumstances presented dictate—as well as that the intent of the exemption relied on allows—that the information should be withheld.

S. Rep. No. 93–854, 93d Cong., 2d Sess. 6 (1974) (emphasis in original). See also H.R. Rep. No. 93–221, 93d Cong., 1st Sess. 59 (1973); H.R. Rep. No. 93–876, *supra,* at 4.[10]

Petitioner dismisses the legislative history of the 1974 amendments as "entitled to little if any weight" in determining whether Congress intended the exemptions to the FOIA to be mandatory or permissive (Br. 18–19 n. 18). But as this Court recognized in *Administrator, Federal Aviation Administration* v. *Robertson*, 422 U.S. 255, 267, the 1974 amendments are significant guides to the interpretation of the Act, including both the amended portions and those that were left intact.

[10] In reporting the proposed Amendments to the full Senate, Senator Kennedy, the floor manager of the bill, reviewed the purposes and history of the Act and observed (120 Cong. Rec. 17016 (1974)):

"[I]t is important to point out that the act [FOIA] attempts to strike a proper balance between disclosure and non-disclosure. * * * Congress certainly did not intend the exemptions * * * to be used to prohibit disclosure or to justify automatic withholding."

The Court noted in *Robertson* that the administration of the FOIA was made subject to "continuing close scrutiny" (*ibid.*) by the appropriate congressional committees. See 5 U.S.C. 552(d). When the House Committee conducted its detailed review of the Act in 1972, and when Congress enacted the 1974 amendments, each oversight committee recognized that the exemptions had been and still were intended to be permissive. In *Robertson* the Court gave weight to the implicit reaffirmation of the continuing validity of exemption 3; the express reaffirmation of the original understanding that the FOIA exemptions were to be permissive is entitled to even greater weight.[11]

Familiar principles of statutory interpretation underscore the significance of the 1974 amendments. Legislative discussions of the meaning of a statute are entitled to significance when they occur in connection with amendments to the statute. This is so because the discussions show the assumptions that give meaning to the amendments and their relationship to the statute, and because the fact that the amendments passed shows that Congress as a whole adopted the views urged on it. Compare *Califano* v. *Sanders,* 430 U.S. 99, with *Regional Rail Reorganization Act Cases,* 419 U.S. 102, 132, and *United States* v. *Wise,* 370 U.S. 405, 411. Given Congress' close oversight of the administration of the FOIA, and its amendments to the

[11] Acting in its oversight capacity, the House Committee has again reaffirmed its view that the exemptions are permissive. H.R. Rep. No. 95–1382, 95th Cong., 2d Sess. 56–57 (1978).

271-103—78——5

Act in 1974 to alter administrative practices and judicial decisions that, in Congress' view, did not accurately carry out the Act, there is a strong inference that Congress meant to adopt or endorse the principle that the exemptions are permissive rather than mandatory. See *Lorillard* v. *Pons*, No. 76–1346, decided February 22, 1978, slip op. 5; *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 395 U.S. 367, 381; *Federal Housing Administration* v. *The Darlington, Inc.*, 358 U.S. 84, 90.

The courts and federal agencies alike have concluded that the FOIA exemptions permit discretionary disclosure of exempt materials. All the courts of appeals that have considered the issue have determined that the exemptions are permissive,[12] and all the executive departments and a number of independent agencies have adopted regulations permitting dis-

[12] In addition to the decision of the court of appeals in this case, see *Sears, Roebuck & Co.* v. *Eckerd*, 575 F. 2d 1197 (C.A. 7), petition for a writ of certiorari pending, No. 78–97; *General Dynamics Corp.* v. *Marshall*, 572 F. 2d 1211 (C.A. 8), petition for a writ of certiorari pending, No. 78–79; *Pennzoil Co.* v. *Federal Power Commission*, 534 F. 2d 627 (C.A. 5); *Charles River Park "A", Inc.* v. *Department of Housing and Urban Development*, 519 F. 2d 935 (C.A. D.C.); *Moore-McCormack Lines, Inc.* v. *I.T.O. Corp., of Baltimore*, 508 F. 2d 945, 950 (C.A. 4). But see *Westinghouse Electric Corp.* v. *Schlesinger*, 542 F. 2d 1190 (C.A. 4), certiorari denied *sub nom. Brown* v. *Westinghouse Electric Corp.*, 431 U.S. 924. Although the Fourth Circuit recognized that invocation of the exemptions is "ordinarily discretionary with the agency" (*id.* at 1197), it added that the exercise of that discretion is subject to "any clear declarations of legislative policy against disclosure as reflected in an exemption of the Act itself * * *" (*ibid.*). *Westinghouse* held that exemption 4, but apparently no other part of the FOIA, forbids disclosure.

closure, under appropriate circumstances, of materials falling within one of the FOIA exemptions.[13]

3. The exemptions pertaining to private interests should be treated like the other exemptions

Petitioner agrees that even if the exemptions are generally permissive, exemption 4 must be construed as requiring withholding because that exemption, like exemption 6,[14] was designed to protect private interests, not the interests of government agencies.

To be sure, exemptions 4 and 6 deal with materials somewhat different from those protected by the other exemptions. Exemptions 4 and 6 were included in the FOIA in recognition of the legitimate interests of

[13] See 22 C.F.R. 6.2(a), 6.6 (Department of State); 31 C.F.R. 1.2(c)(4) (Department of the Treasury); 32 C.F.R. 286.4(b) (Department of Defense); 28 C.F.R. 16.1(a) (Department of Justice); 43 C.F.R. 2.13(d) (Department of the Interior); 7 C.F.R. 1.1 (Department of Agriculture); 15 C.F.R. Part 4, App. A, Section 5.02(d)(1) (Department of Commerce); 29 C.F.R. 70.11(b) (Department of Labor); 45 C.F.R. 5.74 (Department of Health, Education, and Welfare); 24 C.F.R. 15.21 (Department of Housing and Urban Development); 49 C.F.R. 7.61 (Department of Transportation); 10 C.F.R. 202.9(b) (Department of Energy).

Examples of agency regulations providing for discretionary disclosure under various standards include 16 C.F.R. 4.11(a)(1)(iv)(A) (Federal Trade Commission); 47 C.F.R. 0.457, 0.461 (Federal Communications Commission); 40 C.F.R. 2.101(a), 2.119(b) (Environmental Protection Agency); 10 C.F.R. 9.10(c) (Nuclear Regulatory Commission); and 16 C.F.R. 1015.15 (Consumer Product Safety Commission).

[14] Exemption 6 permits agencies to refuse disclosure of "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy" (5 U.S.C. 552(b)(6)).

privacy and confidentiality of persons dealing with the government. See. S. Rep. No. 813, *supra,* at 9; H.R. Rep. No. 1497, *supra,* at 10. Yet none of the legislative history suggests that exemptions 4 or 6 were to be treated differently from the other exemptions or that federal agencies would be obligated to invoke exemptions 4 or 6 when faced with a request for materials arguably falling within the reach of those exemptions. Indeed, even the references to the privacy and confidentiality interests on which petitioner heavily relies often were made in the context of characterizations of the exemptions as permissive. The 1966 Senate Report, for example, states that the Act "sets up workable standards for what records should and should not be open to public inspection. In particular, it [refers to] specific and limited types of information that may be withheld." S. Rep. No. 813, *supra,* at 5. Similarly, although the foreword to the Attorney General's 1967 memorandum on the Act states that the law "gives assurance to individual citizen that his private rights will not be violated," and that "materials such as * * * trade secrets must remain outside the zone of accessibility," the memorandum specifically adopts the view that the exemptions to the Act are permissive. *Attorney General's Memorandum, supra,* at III–IV.[15]

[15] Any doubt that exemption 4 was intended to be permissive was dispelled by 1974. In the reports that led to the 1974 amendments, both the House and Senate Committees had included exemption 4 in characterizing the exemptions as permissive. S. Rep. No. 93–854, *supra*, at 5; H.R. Rep. No. 92–1419, *supra*, at 14. The Senate Committee, moreover, noted approval of several agency regulations that provided for discretionary disclosure of exempt information, including information falling within exemption 4, adding that "[t]his approach was clearly intended by Congress in passing the FOIA." S. Rep. No. 93–854, *supra*, at 6.

Petitioner's attempt to distinguish between the "private" documents and interests addressed by exemptions 4 and 6 and the "public" documents and interests protected by the other seven exemptions rests on a false dichotomy. Information reaches the files of federal agencies because it has to do with the business of government. The government is not, for example, interested in petitioner's "manning tables" simply because it wants to know how to make automobiles. Documents submitted by private parties may show what the government requires of its contractors and how it enforces those requirements. Information obtained from private parties may tell more about the workings of government than about the status of the submitter; materials that are still in the form in which they were submitted may reveal as much about

Various statements made in the coure of the 1963 hearings on the bill which, in amended form, became the FOIA are of limited relevance, since those statements were made at the time when the bill did not contain exemptions for confidential personnel or business information. Freedom of Information: Hearings on S. 1666 and S. 1663 before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 88th Cong., 1st Sess. (1963). The statements on which petitioner relies (Br. 15–16) were made in the context of suggestions that exemptions with respect to these kinds of materials should be added, as they subsequently were.

the "'nature, scope and procedure of federal activities'" (*Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U.S. 1, 17) as would the disclosure of materials that were generated wholly within the agency.[16]

The "public" aspects of putatively "private" documents are well illustrated in this case. Petitioner's obligations as a government contractor entail the elimination of employment discrimination. Regulations and contracts require the agencies with which petitioner deals to make sure that petitioner satisfies its obligations. Disclosure of the materials that petitioner has furnished under the equal employment program not only could demonstrate the extent to which petitioner is satisfying its obligations but also could shed light on the manner in which the government is enforcing its equal employment opportunity programs. See H.R. Rep. No. 95–1382, 95th Cong., 2d Sess. 9 (1978).

Moreover, as petitioner observes (Br. 29–33), exemption 4 serves not only to protect purely private interests but also to safeguard the government's

[16] Similarly, materials generated wholly within an agency may reveal much about private activities. Documents classified as "secret," and thus exempt from mandatory disclosure under exemption 1, may contain information on manufacturing processes or specifications of items secured by the armed forces and made by private contractors. Inter-agency memoranda (covered by exemption 5), investigatory records compiled for law enforcement purposes (covered by exemption 7), reports on financial institutions (covered by exemption 8), and geological and geophysical information (covered by exemption 9) may be predominantly or even exclusively reports on or copies of information submitted by private persons.

ability to obtain necessary information. *National Parks and Conservation Association* v. *Morton*, 498 F. 2d 765, 767–770 (C.A. D.C.).[17] The question whether release of potentially exempt material will undermine the agency's ability to elicit information in the future is one to which the agency is likely to be keenly sensitive; this interest should serve in most instances to dissuade the agency from releasing materials that may be significantly harmful to the private party. Only the agency's determination that a public interest served by disclosure outweighs whatever barriers to cooperation disclosure creates would lead the agency to disclose information covered by exemption 4. The OFCCP regulations at issue in this case recognize the dangers inherent in the release of truly sensitive information and require the comparison we have identified. The regulations provide that in determining whether to disclose exempt information, the Agency must consider whether disclosure would "impede any of the functions of the OFCC[P] or the Compliance Agencies" (41 C.F.R. 60–40.2(a)).

The evaluation whether particular disclosures are likely to hinder agency efforts to obtain cooperation from private parties in the future is peculiarly within the agency's competence to determine. As this Court noted in a related context in *Federal Communications Commission* v. *Schreiber*, 381 U.S. 279, 290, the es-

[17] Exemption 3 may serve much the same function. See *Administrator, Federal Aviation Administration* v. *Robertson*, *supra*, 422 U.S. at 266–267.

tablished principle that administrative agencies should be free to fashion their own rules of procedure, including rules permitting disclosure of assertedly confidential materials

> is an outgrowth of the congressional determination that administrative agencies and administrators will be familiar with the industries which they regulate and will be in a better position than federal courts or Congress itself to design procedural rules adapted to the peculiarities of the industry and the tasks of the agency involved. * * *
>
> To permit federal district courts to establish administrative procedures *de novo* would, of course, render nugatory Congress' efforts to insure that administrative procedures be designed by those most familiar with the regulatory problems involved.

A balance must be struck between the public interest served by disclosure and the public and private interests served by maintaining confidentiality, and the agency that depends on the flow of information is best situated to strike that balance in the first instance.

B. THE FREEDOM OF INFORMATION ACT DOES NOT CREATE A PRIVATE RIGHT OF ACTION TO ENJOIN DISCLOSURE

Petitioner must establish two propositions in order to prevail on its argument that it is entitled, under the FOIA, to judicial relief against the disclosures the Agency proposes to make: first, that the FOIA requires agencies to withhold exempt materials; and second, that there is a private right of action to enforce any requirement of withholding. Petitioner all but ignores the second of these.

As the court of appeals observed (Pet. App. 23a–24a), the question whether the exemptions to the FOIA are permissive is closely related to the question whether there is a private right of action to enjoin disclosure. If the exemptions are permissive, there obviously is no right to require that they be invoked. Nonetheless, certain factors point with particular force to the unavailability of an action based on the FOIA to enjoin disclosure, and those factors deserve separate analysis.

1. The structure of the Act indicates that Congress did not contemplate a private right of action to bar disclosure. Subsection (a) of the Act, 5 U.S.C. 552(a), states the general right of the public to obtain records and sets out procedures for enforcing that right. Subsection (b) then lists the nine exemptions to the Act. As we have noted, with respect to records falling within the exemptions, subsection (b) states that the Act "does not apply." The enforcement and judicial review provisions of subsection (a) therefore do not create any right to judicial review or relief with respect to exempt materials.

2. Subsection (a) of the Act gives a right of action only to persons requesting materials. District courts have jurisdiction over suits "to enjoin the agency from withholding agency records and to order the production of any records improperly withheld from the complainant" (5 U.S.C. 552(a)(4)(B)). The procedural provisions of the Act are directed to enforcing the Act's disclosure obligations (see 5 U.S.C. 552(a)(3), 552(a)(4)(A), 552(a)(4)(F)). The statute does not

authorize suits by submitters of information, and the omission is entirely consistent with the FOIA's emphasis on disclosure rather than confidentiality.

3. As this Court has observed, "[the] express statutory provision for one form of proceeding ordinarily implies that no other means of enforcement was intended by the Legislature." *Securities Investor Protection Corp.* v. *Barbour,* 421 U.S. 412, 419. Although this implication must yield to "clear, contrary evidence of legislative intent" (*National Railroad Passenger Corp.* v. *National Association of Railroad Passengers,* 414 U.S. 453, 458), nothing in its legislative history suggests that the FOIA was intended to authorize courts to bar disclosure of information.[18]

4. The enactment of the Privacy Act of 1974, 5 U.S.C. 552a, supports the view that Congress did not understand the FOIA to have created a private right of action to bar agency disclosure of confidential information. The Privacy Act provides an express right of action for any natural person whenever an agency improperly discloses records relating to that person. 5 U.S.C. 552a(g)(4). If the FOIA had created a private right of action to bar disclosure of exempt materials, this aspect of the civil remedies section of

[18] The court of appeals put the matter well: "[W]hile the Congressional concern over confidentiality of submitter information is clear, an intention to make mandatory the non-disclosure of exempt information is less so, and the evidence of an intent to create a submitter cause of action is practically nonexistent" (Pet. App. 22a–23a).

the Privacy Act would have been unnecessary, for many of the records the Privacy Act was designed to keep confidential would fall within exemption 6 of the FOIA. See 5 U.S.C. 552a(a)(4), 552a(b)(2). Moreover, even the Privacy Act does not authorize injunctive relief against agency disclosure of personal records; Congress instead provided only a limited damages remedy.[19] If the FOIA authorizes courts to enjoin disclosure, the carefully formulated and limited remedies provided under the Privacy Act would be overridden by a much broader implied remedy from the older statute.

In sum, the factors to which this Court looks in determining whether a private right of action should be implied from an otherwise silent statute militate strongly against finding such a right in the FOIA. Persons seeking to force agencies to withhold records are not in the "class for whose especial benefit the statute was enacted." *Texas & Pacific R. Co.* v. *Rigsby,* 241 U.S. 33, 39. The FOIA was enacted to benefit the class of persons seeking access to agency records. Nor is there any "indication of legislative intent, explicit or implicit," to create a remedy on be-

[19] Injunctive relief is available under the Privacy Act only when the agency refuses to provide a person with access to records pertaining to him, 5 U.S.C. 552a(g)(3)(A), 552a(g)(1)(B), 552a(d)(1). When an agency improperly discloses individual records, the affected person has only a right to actual damages sustained as a result of the disclosure, and then only on a showing that the agency acted "in a manner which was intentional or willful." 5 U.S.C. 552a(g)(4).

half of submitters of information. *Cort* v. *Ash*, 422 U.S. 66, 78. And, finally, it is inconsistent "with the underlying purposes of the legislative scheme" (*ibid.*) to imply such a remedy for parties seeking to bar disclosure of records. The Act was designed to promote disclosure, not withholding.[20]

II

THE TRADE SECRETS ACT PROVIDES NO BASIS FOR ENJOINING THE DISCLOSURE OF INFORMATION PURSUANT TO AGENCY REGULATION

A. DISCLOSURE OF AGENCY RECORDS, PURSUANT TO OFCCP REGULATIONS, DOES NOT VIOLATE THE TRADE SECRETS ACT

1. Disclosure of agency records is "authorized by law" within the meaning of the Trade Secrets Act if it is authorized by agency regulations

Under the Trade Secrets Act, 18 U.S.C. 1905, a federal employee or officer is subject to criminal penalties for disclosing trade secrets or other types of business information "in any manner or to any extent not authorized by law." Petitioner argues (Br. 45)

[20] Petitioner relies on *Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U.S. 1, in support of its contention that an implied right to enjoin disclosure should be found in the FOIA. But *Bannercraft* posed the question of the availability of an equitable remedy to promote a right clearly created by the statute. See *Mitchell* v. *Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 290–292; *Porter* v. *Warner Holding Co.*, 328 U.S. 395. The question in this case is not one of remedy, but one of right; *i.e.*, whether the FOIA provides the right petitioner claims it does. As to that question, the doctrine that equitable power is generally available to enforce a recognized right has no applicability.

that only a statute can create "authorization by law" and so permit disclosure. Thus, according to petitioner, even if valid regulations permit disclosure of information falling within the substantive reach of Section 1905, it would still be a criminal offense for an agency employee to release the information.[21] The language and prior construction of Section 1905 and its predecessors indicate, however, that the phrase "authorized by law" embraces forms of legal authorization other than statutes.

Petitioner's suggestion that only a statute can authorize disclosure of materials falling within the reach of Section 1905 runs afoul of a decision of this Court. In *Blair* v. *Oesterlein Co.*, 275 U.S. 220, the Court construed Rev. Stat. 3167, the principal predecessor of Section 1905. That statute prohibited disclosure by tax collection agents of information gained in the course of their duties "in any other manner than may be

[21] Petitioner also asks the Court to rule that Section 1905 is among the nondisclosure statutes embraced by exemption 3 to the FOIA, 5 U.S.C. 552(b)(3) (Br. 56–61). It is unnecessary for the Court to reach this question, which was not addressed by either court below. The combination of exemption 3 and Section 1905 would forbid disclosure only if Section 1905 does so alone, because exemption 3 simply states that other statutes provide authority to withhold. Consequently, if disclosure pursuant to agency regulations is "authorized by law" under Section 1905, disclosure of materials falling within its reach is permissible, whether or not it is among the statutes covered by exemption 3.

provided by law." [22] The Court held that the "provided by law" language was not to be given a narrow reading, but encompassed disclosures "made in obedience to process lawfully issued in a judicial or quasi-judicial proceedings" (*id.* at 227). Similarly, courts have held that disclosure is not unlawful under Section 1905 if the information is discoverable under the Federal Rules of Civil Procedure,[23] and the Attorney General has concluded that the phrase "authorized by law" is not limited to disclosures "specificially authorized by law" but also includes disclosures that may be "necessary or appropriate" for the agency to carry out its statutory responsibilities. 41 Op. Atty Gen. 166, 168, 169 (1953). See also *id.* at 221, 228 (1955).

Moreover, it has long been acknowledged that administrative regulations consistent with the agencies' substantive statutes have the force and effect of law.[24] Therefore, authorization by regulation is authorization "by law." See *Laughlin* v. *United States,* 474 F. 2d 444, 453 n. 12 (C.A. D.C.); *General Services Administration* v. *Benson,* 415 F. 2d 878, 880 (C.A.

[22] At the time of the decision in *Blair*, Rev. Stat. 3167 was codified as 18 U.S.C. 216.

[23] *Exchange National Bank* v. *Abramson*, 295 F. Supp. 87 (D. Minn.), appeal dismissed, 407 F. 2d 865 (C.A. 8); *Pleasant Hill Bank* v. *United States*, 58 F.R.D. 97 (W.D. Mo.).

[24] See *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 536; *United States* v. *Nixon*, 418 U.S. 683, 695; *Free* v. *Bland*, 369 U.S. 663; *United States* v. *Mersky*, 361 U.S. 431, 437–438; *Public Utilities Commission of California* v. *United States*, 355 U.S. 534, 542–543; *Maryland Casualty Co.* v. *United States*, 251 U.S. 342, 349; *Caha* v. *United States*, 152 U.S. 211.

9); *Smith* v. *United States,* 305 F. 2d 197 (C.A. 9). On the basis of this principle, all the courts of appeals that have reached the issue have concluded that disclosure is "authorized by law," within the meaning of Section 1905, when the authorization is contained in agency regulations.[25]

Petitioner's contention that agency regulations cannot authorize the disclosure of materials otherwise protected by Section 1905 rests on the premise that Section 1905 is a legislative curb on agency action rather than a prohibition against unauthorized conduct by individual federal employees (Br. 43–44). In fact, the opposite appears to be the case.

Our analysis starts with the language of the statute. Section 1905 does not restrain agency action directly. It does not instruct agencies how to conduct their business, but instead provides a criminal penalty for agency employees who make unauthorized disclosures of restricted information. The focus of the statutory language on individual (rather than agency) conduct

[25] *Sears, Roebuck & Co.* v. *Eckerd*, *supra*, 575 F. 2d at 1200; *General Dynamics Corp.* v. *Marshall*, *supra*, 572 F. 2d. at 1217; *Westinghouse Electric Corp.* v. *Nuclear Regulatory Commission*, 555 F. 2d 82 (C.A. 3). In *Westinghouse Electric Corp.* v. *Schlesinger*, *supra*, the court did not consider whether the agency regulations could make disclosures "authorized by law" under Section 1905. In *Charles River Park "A", Inc.* v. *Department of Housing and Urban Development*, *supra*, the court concluded that the regulations at issue there did not provide the requisite authorization for disclosure, but it did not reach the question whether the "authority by law" in Section 1905 could be provided by appropriate regulations.

is consistent with the legislative background of Section 1905, which indicates that the non-disclosure provision was intended to protect the public from abuses of office by individual employees who found they could profit personally by disclosing confidential materials to which they obtained access in the course of their work.

The principal precursor of Section 1905 is Rev. Stat. 3167, a criminal provision initially enacted in 1896 to bar unauthorized disclosure of certain business information by revenue officers. 13 Stat. 238. The language of the statute indicates that it was designed to abate individual misconduct by revenue agents, not to affect agency disclosure policies.[26] As codified in the

[26] The legislative history of Rev. Stat. 3167 is quite spare. However, the contemporaneous congressional concern about whether taxing authorities should be permitted to examine confidential corporate books and records suggests that the purpose of the non-disclosure statute was to minimize, if possible, the abuses that could follow from permitting "every little petty [revenue] officer * * * to * * * institute an investigation into the private affairs of the citizen." 66 Cong. Globe, 38th Cong., 1st Sess. 2997 (1864). When Rev. Stat. 3167 was re-enacted in the Tariff Act of 1894, 28 Stat. 509, similar concerns were expressed about the invasion of private rights of confidentiality. Senator Aldrich voiced a widely held concern when he suggested that poor pay and widespread venality among revenue officers would pose a grave danger to the continued confidentiality of business information (26 Cong. Rec. 6893 (1894)): "[A]ll the books of every corporation doing business in the United States [would be opened] to an unnumbered army of revenue agents. If places were offered for sale an applicant could afford to pay any amount of money to be selected for the position of making these examinations. The secrets of the business of every corporation are practically to be made known to competi-

Revised Statutes of 1878, the provision read:

> If any collector or deputy collector, or any inspector, or other officer acting under the authority of any revenue law of the United States, divulges to any party, or makes known in any other manner than may be provided by law, the operations, style of work, or apparatus of any manufacturer or producer visited by him in the discharge of his official duties, he shall be subject to a fine of not exceeding one thousand dollars, or to be imprisoned for not exceeding one year, or to both, at the discretion of the court, and shall be dismissed from office, and be forever thereafter incapable of holding any office under the Government.

After numerous re-enactments, Rev. Stat. 3167 was consolidated in 1948 with two more recently enacted statutes and codified as the Trade Secrets Act, 18 U.S.C. 1905. Act of June 25, 1948, Section 1905, 62 Stat. 791; see H.R. Rep. No. 304, 80th Cong., 1st Sess. A127–A128 (1947). The two other statutes were 19 U.S.C. (1940 ed.) 1335, a non-disclosure statute ap-

tors or made public by this provision. * * * [Corporate secrets] are to be turned over to the tender mercies of poorly paid revenue agents."

Petitioner finds significance (Br. 44–45) in Congress' amendment of a different section of the revenue statutes, dealing with the authority of revenue agents to administer oaths. Rev. Stat. 3165. That provision had originally permitted revenue officers to administer oaths when "authorized by law." In 1878 it was amended to provide that revenue officers could administer oaths as "authorized by law or regulations authorized by law." The legislative history of this amendment indicates, however, that it was added merely to make clear that the Commissioner of Internal Revenue could issue regulations authorizing revenue agents to administer oaths. 7 Cong. Rec. 4005–4006 (1878).

plying to the Tariff Commission,[27] and 15 U.S.C. (1940 ed.) 176a, a non-disclosure provision applying to the Department of Commerce.[28] The Tariff Commission statute tracked Rev. Stat. 3167 in large measure, but the Commerce Department statute was quite different. Unlike the other tax and tariff statutes, the Commerce Department provision did not focus on unauthorized disclosures by government officials; it imposed restrictions directly on the agency. Moreover, unlike the other two statutes, the Commerce Department provision contained no criminal penalties and, most significantly, it contained no exception for disclosures "authorized by law."

In 1948, when it consolidated and codified the old statutes, Congress employed the formulation from Rev.

[27] 39 Stat. 756, 19 U.S.C. (1940 ed.) 1335, provided in pertinent part:

"It shall be unlawful for any member of the [Tariff] commission, or for any employee, agent or clerk of the commission, or any other officer or employee of the United States, to divulge, or to make known in any manner whatever not provided for by law, to any person, the trade secrets or processes of any person, firm, copartnership, corporation, or association embraced in any examination or investigation conducted by the commission * * *."

[28] 52 Stat. 8, 15 U.S.C. (1940 ed.) 176a, provided:

"Any statistical information furnished in confidence to the Bureau of Foreign and Domestic Commerce by individuals, corporations, and firms shall be held to be confidential, and shall be used only for the statistical purposes for which it is supplied. The Director of the Bureau of Foreign and Domestic Commerce shall not permit anyone other than the sworn employees of the Bureau to examine such individual reports, nor shall he permit any statistics of domestic commerce to be published in such manner as to reveal the identity of the individual, corporation, or firm furnishing such data."

Stat. 3167 and the Tariff Commission statute; it discarded the formulation employed in the Commerce Department statute. The surviving language establishes criminal penalties for individual employees rather than general rules for agencies, and it permits disclosures that are "authorized by law."[29]

Shortly after it was codified as Section 1905, Rev. Stat. 3167 was also incorporated, in slightly different form, in the Internal Revenue Code of 1954, where it was codified as 26 U.S.C. 7213(b). Like Section 1905, that statute was criminal, it was addressed to individual agents rather than to the agency as a whole, and it permitted disclosures "authorized by law." Courts uniformly construed Section 7213(b) to permit agency regulations to authorize disclosures. *Laughlin* v. *United States, supra; Smith* v. *United States, supra.*[30]

[29] In a comprehensive study of the legislative history of the Trade Secrets Act, one scholar has concluded that the scope of the Act should be limited to the scope of its three precursors. Clement, *The Rights of Submitters to Prevent Agency Disclosure of Confidential Business Information: The Reverse Freedom of Information Act Lawsuit*, 55 Tex. L. Rev. 587, 607–616 (1977). Although, in the course of codification in 1948, Congress altered the language of the Act to cover materials arguably not encompassed by any of the precursor statutes, no legislative history indicates that Congress intended to create a rule of greater secrecy. Whatever the merit of Clement's argument (see *Muniz* v. *Hoffman*, 422 U.S. 454, 467–474), it is not directly applicable to this case because the Department of Labor has applied the terms of Section 1905 to its own officers and employees. 29 C.F.R. 70.21(a).

[30] Any doubt about whether Section 7213(b) had permitted agency regulations to provide the authorization for disclosures

The legislative background of Section 1905 and the related statute thus support the view that the statute does not restrain formal agency action. Other considerations point in the same direction. Section 1905 is a criminal statute, and ambiguities in the scope of its prohibition should be resolved against a broad view that is not supported by the legislative history. Compare *Adamo Wrecking Co.* v. *United States*, No. 76–911, decided January 10, 1978, slip op. 9, with *Scarborough* v. *United States*, 431 U.S. 563, 577. This principle applies even though this case is not a criminal proceeding. See *Federal Communications Commission* v. *American Broadcasting Co.*, 347 U.S. 284, 296.[31] On petitioner's view of the statute, a subordi-

was dispelled in 1976, when Congress amended that provision for the specific purpose of restricting the exceptions to the nondisclosure rules to those authorized by statute. Pub. L. 94–455, Title XII, Section 1202(h)(3), 90 Stat. 1686, 1688. The provision now permits disclosures only as "authorized in this title." The Conference Report states that the statute was amended to assure "that returns and return information are to be kept confidential except as specifically provided by statute." H.R. Conf. Rep. No. 94–1515, 94th Cong., 2d Sess. 475 (1976). The clear implication is that "authorization by law" and "authorization by statute" are quite different things.

[31] *Federal Communications Commission* v. *Pacifica Foundation*, No. 77–528, decided July 3, 1978, slip op. 10–11 n. 13, is not to the contrary. There the Court noted that, although 18 U.S.C. 1464 is a criminal statute, its terms were independently incorporated in the provisions of the Radio Act of 1927 and the Communications Act of 1934, and the construction of the language in those civil statutes did not necessarily govern the construction of the same language in the criminal statute. Here, by contrast, the Court is faced with the construction of a single, criminal statute.

nate employee of a federal agency could be convicted of violating Section 1905 if the agency's regulations authorized—or even required—disclosure of the materials in question. The harshness of this result provides further support for resolving any ambiguity in the language of Section 1905 in favor of the reading of the phrase "authorized by law" that we have advanced here.

2. The disclosure regulations were issued under appropriate authority

The Secretary of Labor, in promulgating the OFCCP disclosure regulations, stated that they were being issued under the authority of Executive Order 11246, as amended, and 29 C.F.R. 70.71, which permits the issuance of supplemental regulations governing the disclosure of records by particular units within the Department of Labor. 38 Fed. Reg. 3192–3193. The OFCCP disclosure regulations also are valid under 5 U.S.C. 301, the executive departments' "housekeeping statute."

a. Executive Order 11246 provides authority for the OFCCP disclosure regulations

Section 201 of Executive order 11246 provides that, in the exercise of his responsibility to administer the portions of the order applying to government contractors, the Secretary of Labor "shall adopt rules and regulations and issue such orders as he deems necessary and appropriate to achieve the purposes thereof."

Petitioner does not contend that the OFCCP disclosure regulations are not "necessary and appropriate" measures to achieve the purposes of the Executive Order, nor does petitioner argue that the Executive Order could not provide the basis for the issuance of disclosure regulations generally.[32] Instead, petitioner's argument is that although the Secretary purported to base the disclosure regulations on the Executive Order, the regulations state that they "implement * * * the Freedom of Information Act" (41 C.F.R. 60–40.1) and therefore are not, in fact, supported by the authority granted in the Executive Order. In addition, returning to the contention that Section 1905 absolutely bars disclosure of materials falling within its purview unless another statute authorizes disclosure, petitioner argues

[32] It is well established that the Executive Order has the force and effect of law. *United States* v. *New Orleans Public Service, Inc.*, 553 F. 2d 459, 465 (C.A. 5), on rehearing, 559 F. 2d 30, vacated on other grounds, June 5, 1978 (No. 77–497); *Southern Illinois Builders Association* v. *Ogilvie*, 327 F. Supp. 1154 (S.D. Ill.), affirmed, 471 F. 2d 680 (C.A. 7); *Contractors Association of Eastern Pennsylvania* v. *Secretary of Labor*, 442 F. 2d 159 (C.A. 3), certiorari denied, 404 U.S. 854; *Farkas* v. *Texas Instruments, Inc.*, 375 F. 2d 629 (C.A. 5), certiorari denied, 389 U.S. 977; see generally *Old Dominion Branch No. 496, National Association of Letter Carriers, AFL–CIO* v. *Austin*, 418 U.S. 264, 273 n. 5. Regulations issued under the authority of the Executive Order, like regulations issued under an authorizing statute, are valid if within the scope of the order. See also Comment, *The Philadelphia Plan: A Study in the Dynamics of Executive Power*, 39 U. Chi. L. Rev. 723 (1972), which discusses the history of and authority for Executive Order 11246.

that the Executive Order cannot provide a basis for authorizing the release of such materials.[33]

As to the first contention, we believe that the regulations could be sustained as implementing the FOIA. The Act refers to published agency rules stating the time, place, fees, and procedures for the disclosure of materials covered by the Act. 5 U.S.C. 552(a)(3). The OFCCP regulations deal with both materials that must be produced under the Act and materials that are disclosed as a matter of discretion; they set forth "the places at which and the procedures whereby

[33] Petitioner also refers to the fact that the OFCCP disclosure regulations were not formally promulgated as legislative rules (see 38 Fed. Reg. 3193); it apparently contends that this circumstance buttresses its argument that the regulations do not adequately authorize disclosure.

There are several answers to this suggestion. First, although "interpretive" rules cannot extinguish rights of persons affected by agency action, see *Morton* v. *Ruiz*, 415 U.S. 199, 236, the regulations in this case do not have that effect. They simply announce that disclosures of certain kinds are in accordance with agency policy and do not subject agency employees and officers to criminal liability under Section 1905. See *United States* v. *Pennsylvania Industrial Chemical Corp.*, 411 U.S. 655, 674. Second, even if it were necessary that regulations satisfy the requirements of 5 U.S.C. 553 in order to provide legal authorization for disclosure of materials falling within the reach of Section 1905, those standards were met here. While the Secretary of Labor stated that the notice and comment requirements of Section 553 were not technically applicable, he added that "[i]n accordance with the spirit of the public policy set forth in 5 U.S.C. 553," the requirements of that section would be compiled with, and comments on the disclosure regulations would be evaluated and acted on "in the same manner as if this document were a proposal." 38 Fed. Reg. 3193.

members of the public may obtain access to and inspect and copy information from records in custody of the OFCC[P] and the compliance agencies" (41 C.F.R. 60–40.1). Accordingly, the regulations "implement" the FOIA.

Beyond this, however, the text of the regulations makes it plain that they are based on the authority of the Executive Order, as the Secretary expressly stated (38 Fed. Reg. 3193), and not solely on the FOIA. The portion of the regulations setting out their "purpose and scope" explains (41 C.F.R. 60–40.1):

> It is the policy of the OFCC[P] to disclose information to the public and to cooperate with other public agencies as well as private parties seeking to eliminate discrimination in employment.

The purpose of the Executive Order is to combat discrimination in employment, and a disclosure policy designed to further this purpose is consistent with the Executive Order and an appropriate subject for regulation under its aegis. See *Federal Communications Commission* v. *Schreiber, supra,* 381 U.S. at 291–294.

Petitioner's reliance on Section 1905 is circular. If Section 1905 permits disclosure of materials whose release is authorized by regulation, as we have argued above, then that statute cannot be read to bar the promulgation of regulations permitting such disclosure. Moreover, although a Department of Labor regulation, 29 C.F.R. 70.21, incorporates the provisions of Section 1905 verbatim, the OFCCP disclosure regulations provide the legal authorization that permits disclosure under 29 C.F.R. 70.21, just as they do for the purposes of Section 1905.[34]

b. The OFCCP disclosure regulations are authorized by the executive housekeeping statute, 5 U.S.C. 301

The "housekeeping statute," 5 U.S.C. 301, provides that the head of each executive department can prescribe regulations governing departmental matters, including the "custody, use, and preservation of [the department's] records, papers, and property." Regulations promulgated under the housekeeping statute are valid unless they plainly violate the law or are palpably inappropriate to the legislative design. *Boske* v. *Comingore*, 177 U.S. 459. Departmental regulations, moreover, can properly authorize disclosure of information, even if the information is assertedly confidential. See *Federal Communications Commission* v. *Schreiber, supra,* 381 U.S. at 291–294; *Isbrandtsen-Moller Co.* v. *United States,* 300 U.S. 139; *Norwegian Nitrogen Products Co.* v. *United States,* 288 U.S. 294, 321–322. Accordingly, the OFCCP disclosure regulations are supported by the authority granted to the Department of Labor to regulate the "custody [and] use of its records [and] papers." [35]

---

[34] The OFCCP disclosure regulations properly supplement the general Department of Labor disclosure regulations. A regulation on which the Secretary expressly relied in promulgating the OFCCP disclosure regulations, 29 C.F.R. 70.71, provides for such supplementary regulations.

[35] Although the Secretary did not expressly invoke 5 U.S.C. 301 as a source of his power to issue the regulations here at issue,

Against the force of this line of authority, petitioner relies on the legislative history of a 1958 amendment to Section 301 (Br. 48–51). The reliance is unwarranted.

As petitioner points out (Br. 48), Section 301 or its predecessors have been in effect since 1789. In 1958, Congress amended the Act to add the final sentence, which provides that the Act "does not authorize withholding information from the public or limiting the availability of records to the public" (72 Stat. 547). That sentence was added because of congressional discontent with the agency practice of invoking Section 301 as authority to withhold information from the public. See S. Rep. No. 1621, 85th Cong., 2d Sess. 2 (1958).

Representative Moss, the sponsor of the legislation, stated that the amendment would not undermine "any other statutory authority which confers upon the departments and agencies of Government the right to withhold information." 104 Cong. Rec. 6549 (1958). The new sentence was designed, he said, to stop the practices of federal departments and agencies that had "tortured this language [of Section 301] into a broad authority to withhold information from the public and even from the Congress itself." *Ibid.* In a statement heavily relied upon by the petitioner, Rep. Moss added that the legislation would "not affect the

---

the regulations nonetheless can be sustained under that authority. See *Massachusetts Trustees* v. *United States*, 377 U.S. 235, 248; *National Labor Relations Board* v. *Wyman-Gordon Co.*, 394 U.S. 759, 766–767 n. 6 (plurality opinion).

confidential status of information given to the Government and carefully detailed in Title 18, United States Code, Section 1905." *Id.* at 6550.

Petitioner maintains that Rep. Moss's statement means that Section 301 does not provide the authority for any regulation permitting disclosure of materials falling within the reach of Section 1905. The context of the statement, however, suggests quite a different meaning. Rep. Moss was referring only to the final sentence, which was the legislation before the House. Thus, rather than suggesting that Section 301—and any regulations that might be enacted under its authority—could not authorize disclosure of materials within the reach of Section 1905, Rep. Moss meant that the prohibition against using Section 301 to justify withholding would not repeal or interfere with Section 1905 or any other withholding statute.[36]

Petitioner also relies on a statement by Representative Meader that Section 301 "was not intended to deal with the authority to release or withhold information or records" (104 Cong. Rec. 6562 (1958)). Petitioner contends that Rep. Meader meant to suggest that Sec-

---

[36] At all events, there is no indication that any other Member of Congress agreed with Rep. Moss's statement of the effects of the new legislation. The remark of a single legislator—even the sponsor of a bill—is not particularly reliable as an indication of the intent of Congress. See *Chandler* v. *Roudebush*, 425 U.S. 840, 859 n. 36. Certainly nothing in the 1958 debates indicates that Congress as a whole intended the amendment, which bars the use of Section 301 to withhold information, also silently to prohibit the use of Section 301 to disclose information. The general design was to promote disclosure, not to restrict it.

tion 301 was not intended to authorize regulations permitting disclosure of agency information. Again, the context of the statement makes it clear that Rep. Meader was not addressing the legitimacy of agency disclosure regulations under Section 301 but was instead protesting the agency practice of relying on Section 301 to withhold information from the public. His statement was made in the course of offering an amendment to Section 301 that would have added the proviso that "no regulation shall be prescribed under this section authorizing or directing the withholding of information from the public or limiting the availability of records to the public." 104 Cong. Rec. 6562 (1958). The amendment was entirely pro-disclosure.

More pertinent to the understanding of the authority of agencies to disclose information under Section 301 are the remarks of Representative Fascell in response to another proposed amendment, which would have provided that Section 301 should not be construed to require that agencies make records available. Rep. Fascell opposed that amendment, stating (104 Cong. Rec. 6569 (1958)):

> The only correct interpretation of the existing law is that the head of the department * ** * has been given the right to prescribe rules and regulations dealing with the custody, use and preservation of the records * * * [I]f you adopt the proviso in the amendments which are suggested you raise the contrary presumption that he shall not have the right to make information and records available. This is why the amendment should be defeated.

The roll was then called and the amendment to the Moss bill rejected. *Id.* at 6573.

In sum, the legislative history of the 1958 amendment to Section 301, to the extent that it sheds any light on the issue, supports the natural reading of Section 301 as authorizing regulations permitting discretionary agency disclosure of records.

B. THE TRADE SECRETS ACT DOES NOT CREATE A PRIVATE RIGHT OF ACTION TO ENJOIN DISCLOSURE

Even if the OFCCP disclosure regulations do not provide legal authorization for disclosure under the Trade Secrets Act, it does not follow that petitioner has the right to an injunction against any disclosure. Section 1905 is a criminal statute, and it creates no private right of action.

Ordinarily, private parties cannot enforce criminal statutes. It makes little difference in practice whether this is so because they do not authorize a private civil remedy (see *Cort* v. *Ash, supra*, 422 U.S. at 78–80); because the injured party lacks standing (see *Linda R. S.* v. *Richard D.*, 410 U.S. 614); or because equity will not enjoin the commission of a crime (Chafee and Re, *Equity* 935–954 (5th ed. 1967)).[37] Although this Court on occasion has held that a particular criminal statute implicitly creates a private right of action, the Court has observed that in each instance there has been "a statutory basis for inferring that a civil cause of action of some sort lay in favor of someone." *Cort*

[37] But see *In Re Debs*, 158 U.S. 564.

v. *Ash, supra,* 422 U.S. at 79.[38] Section 1905 offers no similar "statutory basis."

The protection of private interests in confidentiality undoubtedly was one of the purposes that underlay Section 1905, although the genesis of the statute primarily was Congress' desire to prevent revenue officers from misusing their offices for personal advantages (see pages 39–45, *supra*). Nonetheless, there is no "indication of legislative intent, explicit or implicit, * * * to create * * * [a private] remedy." *Cort* v. *Ash, supra,* 422 U.S. at 78. Moreover, although vigorous enforcement of Section 1905 might provide a benefit to all persons whose business information may from time to time come into the hands of government agents, that category of persons is not a " 'class for whose *especial* benefit the statute was enacted' " (*ibid.,* quoting *Texas & Pacific R. Co.* v. *Rigsby, supra,* 241 U.S. at 39). The beneficiaries of Section 1905 include the public at large, and every business enterprise, any one of which may be a victim of the assertedly unlawful conduct.

Perhaps most significantly, a private right of action to enjoin disclosure should not be implied in favor of petitioner and others similarly situated because petitioner has another adequate remedy. In *Cort* v. *Ash,*

[38] The three cases in which the Court found implied rights of action in criminal statutes all involved statutory schemes that led irresistably to a private right of action or provided for some civil remedies, leaving only the question whether additional remedies (beyond those mentioned) were available. See *Cort* v. *Ash, supra,* 422 U.S. at 79–80 and n. 11.

supra, 422 U.S. at 78, the Court noted that when the availability of relief for the kind of injury complained of is governed by another statutory scheme (in that case, by state law), there is little reason to imply a remedy for violation of a federal criminal statute. See also *Bivens* v. *Six Unknown Federal Narcotics Agents,* 403 U.S. 388, 394–395; *id.* at 400 (Harlan, J., concurring). The Administrative Procedure Act provides a means by which petitioner may obtain judicial review of any proposed disclosure of assertedly confidential materials. In an Administrative Procedure Act case, moreover, the plaintiff can resist disclosure on the ground that it would violate legally protected interests in confidentiality—the same claim that it would raise in the context of a suit for an injunction under the implied authority of Section 1905. Accordingly, petitioner's contentions properly should be considered in an administrative review proceeding, not in an injunctive action based on an implied private right of action to enforce the criminal provisions of Section 1905.[39]

[39] Petitioner suggests (Br. 24 n. 26) that disclosure assertedly confidential information should be forbidden for the additional reason that it would be a "taking of property" without just compensation. In our view this argument is frivolous. But it is unnecessary for the Court to address the contention, because petitioner can assert its "taking" argument in a suit under the Tucker Act, 28 U.S.C. 1491. See *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.,* No. 77–262, decided June 26, 1978, slip op. 32 n. 39; *Regional Rail Reorganization Act Cases,* 419 U.S. 102, 125–136. The Tucker Act, moreover, is another remedy available in lieu of an implied cause of action.

III

JUDICIAL REVIEW OF AN AGENCY DECISION TO DISCLOSE RECORDS IS AVAILABLE ONLY ON THE ADMINISTRATIVE RECORD UNDER THE STANDARDS OF THE ADMINISTRATIVE PROCEDURE ACT

Judicial review of final agency action ordinarily is conducted under the Administrative Procedure Act (APA). *Dunlop* v. *Bachowski,* 421 U.S. 560; *Camp* v. *Pitts,* 411 U.S. 138; *Citizens to Preserve Overton Park* v. *Volpe,* 401 U.S. 402. The standards of APA review are set out in Section 10(e) of the Act, 5 U.S.C. 706. Under Section 10(e), an agency's action is not subject to *de novo* judicial factfinding or review except in extraordinary cases.[40] *Camp* v. *Pitts, supra,* 411 U.S. at 141–142; *Citizens to Preserve Overton Park* v. *Volpe, supra,* 401 U.S. at 413–414. No statute indicates that Congress intended to preclude judicial review, under the APA, of decisions to disclose information. Petitioner therefore is "entitled to judicial review" of its contention that it is "suffering legal wrong because of agency action" (5 U.S.C. 702), but that review should not be *de novo.*[41]

[40] This rule is fortified by the presumption against *de novo* review of agency action. *Consolo* v. *Federal Maritime Commission,* 383 U.S. 607, 619 n. 17; *United States* v. *Carlo Bianchi & Co.,* 373 U.S. 709, 715; see also *Chandler* v. *Roudebush,* 425 U.S. 840, 861–862.

[41] Petitioner maintains that the FOIA and the Trade Secrets Act create an implied right of action under which it is entitled to *de novo* consideration of a disclosure decision (Br. 62–69), but this argument fails because, as we have shown at pages 32–36 and 53–55, *supra,* neither the FOIA nor the Trade Secrets Act creates a private right of action. Accordingly, review is available to petitioner only under the Administrative Procedure Act.

Petitioner contends (Br. 69-72) that it is entitled to *de novo* review in the district court under the APA because, if material falls within exemption 4 or if its disclosure would violate Section 1905, there is no room for agency discretion to release it. That argument, of course, fails if the Court rejects petitioner's contention that some statute requires withholding. If we are correct that exemption 4 is permissive rather than mandatory and that agency regulations can permit release of information otherwise within the reach of Section 1905, then the disclosure decision would be subject to agency discretion, and review of the exercise of that discretion would be controlled by 5 U.S.C. 706(2)(A), which permits a court to set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[42]

Petitioner also contends (Br. 72–81) that there should be *de novo* review of agency disclosure determinations because the fact finding procedures employed by agencies in responding to FOIA disclosure requests are inadequate. Petitioner argues that "the constraints imposed on the agencies by the FOIA itself" (Br. 74)—particularly the short time period

[42] If, as petitioner argues, either exemption 4 or 18 U.S.C. 1905 forbids disclosure, that prohibition can be enforced on judicial review under Section 706(2)(A). There is no reason why the content of the substantive legal rule should affect the procedures for judicial review. Petitioner's arguments show why, in its view, it should win on the merits, not why it is entitled to *de novo* review.

within which an agency must determine whether to comply with a disclosure request—preclude adequate agency decision making.

Under the FOIA an agency generally must determine within 10 days of the receipt of a disclosure request whether it will comply with the request. 5 U.S.C. 552(a)(6)(A)(i). In Congress' judgment this period is sufficient to enable an agency to determine whether the FOIA requires disclosure. Petitioner's contention that the time period is too short for informed consideration is thus contrary to the congressional judgment. Because Congress evidently does not share petitioner's assessment of the efficacy of the 10-day period, it would be inappropriate to conclude that the FOIA creates an exception to the standards of the APA.

In any event, the time constraints on agency action are not as rigid as petitioner suggests. The FOIA expressly provides that in "unusual circumstances" an agency may take an additional 10 working days to determine whether to disclose requested materials (5 U.S.C. 552(a)(6)(B)). In addition, if the agency can show that "exceptional circumstances" exist, and that it is exercising due diligence to process disclosure requests expeditiously, a court may allow the agency additional time beyond the time limits prescribed in 5 U.S.C. 552(a)(6)(A). See *Open America* v. *Watergate Special Prosecution Force,* 547 F. 2d 605, 616 (C.A. D.C.). Moreover, once the agency makes the initial determination that requested material is within the scope of one of the exemptions, the provisions of the FOIA, including the 10-day disclosure rule, "do[]

not apply." 5 U.S.C. 552(b). Thus, if the agency concludes that more than 10 days are required to determine whether exempt material should be disclosed as a discretionary matter under agency regulations, the agency is free, under the FOIA, to take as much time as it needs to consider the factors bearing on whether disclosure should be ordered.[43] The agency's refusal to consider the submitter's views or to permit the submitter a reasonable opportunity to voice its objections to discretionary disclosure could constitute a ground for challenging the agency's decision as arbitrary, capricious, or an abuse of discretion. See *Citizens to Preserve Overton Park* v. *Volpe, supra,* 401 U.S. at 416. Finally, if a decision is actually made without gathering the necessary information or considering essential facts, a court could remand the case to the agency for additional consideration, as this case demonstrates (Pet. App. 38a–40a). *De novo* review is not necessary.

Petitioner further contends that agency fact-finding procedures are inadequate because the agencies possess insufficient expertise with respect to the potential competitive injury that could result from disclosure of confidential business information. The

[43] The OFCCP disclosure regulations provide that contractors should, at the time of submission, identify materials that they regard as confidential and state why the materials should not be disclosed. 41 C.F.R. 60–60.4(d). This enables the agency to know, prior to any FOIA request, why the submitter believes particular materials should be withheld.

courts, however, are no better suited to determine whether disclosure of particular information would result in competitive harm. Indeed, since the agencies are generally familiar with the detailed operations of the industries they regulate, the agencies are more likely to be able to make informed judgments about the benefits of preserving confidentiality of particular material. Companies resisting disclosure are free, of course, to present the same information to the agency that they would present to a court on *de novo* review in support of their contention that the disclosure of particular material would result in substantial competitive harm. Again, if an agency should refuse to consider such presentations, or should arbitrarily disregard them, the agency's conduct could provide a basis for challenging its decision.

Petitioner's final point is that the agency fact-finding process is inadequate because the agencies are not required to, and do not, make sufficient findings in the course of ordering disclosure to permit informed judicial review. But an agency has no general obligation to write an opinion in response to every request made of it (*Renegotiation Board* v. *Grumman Aircraft Engineering Corp., supra,* 421 U.S. at 191–192), and the absence of an opinion thus could not make the APA's judicial review provisions inapplicable. The agency's failure to create an administrative record sufficient to permit judicial review may be a basis on which the agency's action can be challenged in court,

but it is not a reason to change the standard of judicial review.

This case illustrates our argument. The court of appeals hald that the administrative record is "not sufficient[] [to] disclose the basis for the agency determination that the FOIA exemptions are inapplicable" and does not show "that, or why, such disclosure would be in the public interest" (Pet. App. 39a–40a). We have not challenged the remand, and the decision of the court of appeals provides ample indication that review under the standards of 5 U.S.C. 706(2)(A) enables courts to require agencies to discharge their responsibilities under the administrative process.[46]

[46] We do not imply that judicial proceedings under Section 706 after remand would afford petitioner another opportunity to argue that exemption 4 or 18 U.S.C. 1905 absolutely bars disclosure. Moreover, APA review does not authorize courts to second-guess the wisdom of particular disclosure decisions. Review under the APA is limited to contentions that the plaintiff is "suffering legal wrong" (5 U.S.C. 702) because of agency action. It is therefore necessary for a court to identify a source of "legal wrong" before it may grant relief.

If the Court should agree with our arguments about exemption 4 and 18 U.S.C. 1905, and with our contention that the OFCCP disclosure regulations are supported by authority to issue regulations, then disclosure could cause petitioner "legal wrong" in only two ways, First, petitioner could argue that the regulations, although authorized, are arbitrary in particular provisions; second, petitioner might argue that the agency did not comply with the OFCCP regulations in deciding to disclose the documents. See *Board of Curators* v. *Horowitz*, No. 76–695, decided March 1, 1978, slip op. 13 n. 8. The court of appeals has not foreclosed either of these possible arguments, although the reasoning that we have advanced here for permitting federal agencies to disclose information, if accepted, doubtless would make it difficult for petitioner to prevail on the first argument.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.
BARBARA ALLEN BABCOCK,
Assistant Attorney General.
WILLIAM C. BRYSON,
Assistant to the Solicitor General.
LEONARD SCHAITMAN,
PAUL BLANKENSTEIN,
Attorneys.

AUGUST 1978.

U.S. GOVERNMENT PRINTING OFFICE: 1978

Supreme Court, U. S.
FILED
OCT 30 1978
MICHAEL RODAK, JR., CLERK

FOR ARGUMENT.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-922

CHRYSLER CORPORATION, *Petitioner,*

v.

HAROLD BROWN, ET AL., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF OF PETITIONER CHRYSLER CORPORATION

BURT A. BRAVERMAN
FRANCES CHETWYND
MARGARET ROLNICK
COLE, ZYLSTRA & RAYWID
2011 Eye Street, N.W.
Washington, D.C. 20006

A. WILLIAM ROLF
P.O. Box 1919
Detroit, Michigan 48288

Attorneys for Petitioner Chrysler Corporation

October 30, 1978

TABLE OF CONTENTS

		Page
I.	The Court's Decision In This Case Should Accommodate The Private Interests Of Businesses Which Furnish Trade Secrets And Confidential Commercial Information To The Government	1
II.	The Legislative History Of The FOIA And The 1974 Amendments Shows That Exemption 4 Was Intended To Assure The Confidentiality Of Trade Secrets And Private Business Information	10
A.	THE 1967 LEGISLATIVE HISTORY SHOWS THAT CONGRESS INTENDED EXEMPTION 4 TO BE APPLIED IN A MANDATORY FASHION	11
B.	THE LEGISLATIVE HISTORY OF THE 1974 AMENDMENTS DOES NOT ESTABLISH THAT EXEMPTION 4 MUST BE APPLIED IN A PERMISSIVE MANNER	13
III.	Disclosure Of Petitioner's Documents Pursuant To OFCCP Regulations Will Violate 18 U.S.C. §1905	17
A.	AGENCY REGULATIONS DO NOT CONSTITUTE AUTHORIZATION "BY LAW" WITHIN THE MEANING OF §1905	18
B.	NEITHER 5 U.S.C. §301, THE FOIA NOR EXECUTIVE ORDER 11246 PROVIDES AUTHORITY FOR ADOPTION OF AGENCY REGULATIONS LIMITING THE APPLICABILITY OF §1905	22
IV.	18 U.S.C. §1905 Is An Exempting Statute Within The Meaning Of FOIA Exemption 3	26
V.	A Person Seeking To Enjoin Disclosure Of Trade Secrets Or Confidential Business Information Is Entitled To A Trial De Novo	28
CONCLUSION		34

TABLE OF AUTHORITIES

CASES	Page
American Jewish Congress v. Kreps, No. 75-1541 (D.C.Cir.)	10
Burlington Northern Co. v. EEOC, 17 F.E.P. Cases (B.N.A.) 1358	10
Colonial Trust Company v. Goggin, 230 F.2d 634	7
Cort v. Ash, 422 U.S. 66	29
Cross v. United States, 512 F.2d 1212	33
Crown Central Petroleum Corp. v. Kleppe, 424 F.Supp. 744	28
Dept. of Air Force v. Rose, 425 U.S. 352	11
EPA v. Mink, 410 U.S. 73	13
Exxon Corp. v. FTC, No. 76-0812 (D.C. Cir)	32
FAA Administrator v. Robertson, 422 U.S. 255	16,27
FCC v. Cohn, 154 F.Supp. 899	21,22
FCC v. Schreiber, 381 U.S. 279	25
General Services Administration v. Benson, 415 F.2d 878	18
General Dynamics Corp. v. Marshall, 572 F.2d 1211	30
Illinois Brick Co. v. Illinois, 431 U.S. 720	14
International News Service v. Associated Press, 248 U.S. 215	7
Isbrandtsen-Moller Co. v. United States, 300 U.S. 139	25
Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470	3, 4, 5, 7
Krawez v. Stans, 306 F.Supp. 2130	32
Lee Pharmaceuticals v. Kreps, 577 F.2d 610	10

	Page
National Association of Letter Carriers AFL-CIO v. Independent Postal System, Inc., 470 F.2d 265	29
National Parks and Conservation Assn. v. Morton, 498 F.2d 765	15,16,27
NLRB v. Robbins Tire and Rubber Company, 98 S.Ct. 2311	7
Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294	25
Peters v. Hobby, 349 U.S. 331	26
Polaroid Corp. v. Costle, No. 78-1133-S (D.Mass.)	8
Red Lion Broadcasting Co. v. FCC, 395 U.S. 367	16
Regional Rail Reorganization Act Cases, 419 U.S. 102	14,15
Renegotiation Board v. Bannercraft Clothing Co., 415 U.S. 1	7,29
Sears, Roebuck & Co. v. EEOC, 17 F.E.P. Cases (B.N.A.) 897	10
Sears, Roebuck & Co. v. General Services Administration, 533 F.2d 1378	26,31
St. Regis Paper Company v. United States, 368 U.S. 208	21
Texas & Pacific R. Co. v. Rigsby, 241 U.S. 33	29
United States v. Basic Products Co., 260 F.2d 472	8
United States v. General Motors, 323 U.S. 373	4
United States v. Paine, 361 U.S. 304	15
United States v. Wise, 370 U.S. 405	17
USS-OCF-W&M v. Eckerd, No. 76-1933 (D.D.C.)	5, 12

	Page
Weber v. Kaiser Aluminum & Chemical Corp., 563 F.2d 216	25
Westinghouse Electric Corp. v. Schlesinger, 392 F.Supp. 1246	17
Whalen v. Roe, 429 U.S. 589	17
Zacchini v. Scripps-Howard Broadcasting, Inc., 433 U.S. 562	4
CONSTITUTION, STATUTES AND REGULATIONS	
U.S. Const. Art. I, §8, cl. 8	2
5 U.S.C. §101	26
Administrative Procedure Act	
5 U.S.C. §301	18,22,23 24,26
5 U.S.C. §706	29,30
Freedom of Information Act	
5 U.S.C. §552(a)(1)	11
5 U.S.C. §552(a)(2)	11
5 U.S.C. §552(b)(3)	*passim*
5 U.S.C. §552(b)(4)	*passim*
Government in the Sunshine Act,	
5 U.S.C. §552b, Pub.L.No. 94-409, 90 Stat 1241	15
13 U.S.C. §9(a)(2)	9
15 U.S.C. §176a	9,21
15 U.S.C. §176b	21
15 U.S.C. §1193(c)	20
15 U.S.C. §1401(e)	20
15 U.S.C. §1402(d)	20
15 U.S.C. §1418(a)(2)(B)	20
15 U.S.C. §1914(b)	20

	Page
15 U.S.C. §1944(f)	20
15 U.S.C. §1990d(d)	20
15 U.S.C. §2055(a)(2)	20
15 U.S.C. §2217	20
15 U.S.C. §2601	8
15 U.S.C. §2613	3
18 U.S.C. §216	22
18 U.S.C. §1905	*passim*
19 U.S.C. §1335	21
21 U.S.C. §331(j)	3
26 U.S.C. §6103(a)	19,20
26 U.S.C. §7213	6,19,20
26 U.S.C. §7216	20
28 U.S.C. §1491	29
33 U.S.C. §1322(g)(3)	20
42 U.S.C. §1857h-5(a)(i)	3
42 U.S.C. §263g(d)	20
42 U.S.C. §4912(b)	20
46 U.S.C. §1463(b)	20
49 U.S.C. §1681(d)	20
49 U.S.C. §1905(b)	20
Civil Rights Act, Title VII, §703(d), 42 U.S.C. §2000e-2(d)	25
Revenue Act of 1864, ch. 173, §38, 13 Stat. 223	17
Revised Statutes of the United States, §§3165-3168 (1st ed.)	18, 19, 20, 21, 22
Ill. Rev. Stat., Ch. 111½, §1001 *et seq.*	3
N.J. Stat. Ann. Title 2A, §119-5.2	3

	Page
Pub.L. 94-455, Title XII, §1202, 90 Stat. 1686 .	19
Pub.L. 94-202 §8(g), 89 Stat. 1139	20
29 C.F.R. §2.4(a)	9
29 C.F.R. §2.4(b)	9
29 C.F.R. §70.21(a)	21
LEGISLATIVE MATERIALS	
7 Cong. Rec. 4006	19
26 Cong. Rec. 6893	17
104 Cong. Rec. 6548-69	23,24,25
104 Cong. Rec. 15688	23
110 Cong. Rec. 17086	12
122 Cong. Rec. H7897	28
S.Rep.No. 93-854, 93d Cong., 2d Sess.	16
H.R.Rep.No. 1461, 85th Cong., 2d Sess.	24
H.R.Rep.No. 1497, 89th Cong., 2d Sess.	12,33
H.R.Rep.No. 92-1419, 92nd Cong., 2d Sess.	14
H.R.Rep.No. 95-1382, 95th Cong., 2d Sess.	15
Administration and Operation of the FOIA, Hearings Before the House Comm. on Government Operations, Subcommittee on Foreign Operations and Government Information, Parts 4, 5 and 6, 92nd Cong., 2d Sess.	15,16
MISCELLANEOUS	
Executive Order 11246, 30 Fed. Reg. 12319	*passim*
Executive Order 12086, 43 Fed. Reg. 46501	26
38 Fed.Reg. 3193	26
Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act	4

	Page
Dept. of Labor, "Preliminary Report on the Revitalization of the Federal Contracts Compliance Program"	8
General Accounting Office, "The Equal Employment Opportunity Program For Federal Nonconstruction Contractors Can Be Improved"	8
Restatement of Torts §757(a)	7
12A Business Organizations, Milgrim, Trade Secrets	3
Note, *The Effect of the 1976 Amendment to Exemption 3 of the Freedom of Information Act*, 76 Colum.L.Rev. 1029	28

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-922

CHRYSLER CORPORATION, *Petitioner,*

v.

HAROLD BROWN, ET AL., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

REPLY BRIEF OF PETITIONER CHRYSLER CORPORATION

I. The Court's Decision In This Case Should Accommodate The Private Interests Of Businesses Which Furnish Trade Secrets And Confidential Commercial Information To The Government

In our opening brief, we described the fundamental difference which exists under Exemption 4 of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(b)(4), between *private* business information which is developed and compiled at private expense and furnished to the Government for a limited regulatory purpose, and *agency* information which is produced by the bureaucracy itself. Pet. Br. 33-38. Where private documents are found to fall

within Exemption 4 because they contain trade secrets or confidential commercial or financial information, the policies underlying the fourth exemption require that those documents be withheld from disclosure.

Respondents suggest that the distinction noted by Petitioner rests on a "false dichotomy." They argue that documents such as those compiled and submitted to the Government by Petitioner and other government contractors have reached the Government "because [they have] to do with the business of government", and that such information "may tell more about the workings of government than about the status of the submitter." Arguing that the "public aspects" of such documents require that they be disclosed under the FOIA, Respondents brush aside any inquiry into, or consideration of, the private interests in maintaining the confidentiality of those documents and the harm to those interests which disclosure will cause. Resp. Br. 29.

Respondents have ignored what may be the cutting edge in this case. For, only by recognizing the distinction between *private* and *agency* records can both the legitimate interests of persons and businesses who furnish confidential business information to the Government, and the sometimes conflicting disclosure objective of the Freedom of Information Act, be accommodated. Because this distinction is at the heart of the proper resolution of the issues of this case, prior to responding to the several points raised in Respondents' brief we will focus on this subject and explain further why the decision issued by the Court ought to accommodate these important private interests.

1. Article I, Section 8, Clause 8 of the Constitution directs Congress "to promote the Progress of Science and the useful Arts." Pursuant to this mandate, Congress has

created an elaborate system of laws designed to protect trade secrets and confidential business information;[1] and the States have provided residual protection to such information in areas which Congress has not occupied.[2] These laws are intended to fulfill distinct, but complementary, functions: first, to protect the fruits of an inventor's or innovator's efforts from misappropriation or diminution in value; and second, by protecting these creative efforts for the individual, to promote innovative and inventive activities that will inevitably lead to a sounder economy and a better quality of life for all citizens. See 12A Business Organizations, Milgrim, Trade Secrets § 6.01 at 6-4 (1978).

This Court has recognized and endorsed both of these important goals. In *Kewanee Oil Co.* v. *Bicron Corp.*, 416 U.S. 470 (1974), in examining the relationship between federal patent and state trade secret laws, the Court observed that protection of trade secrets and confidential information has "a decidedly beneficial effect on society *** [because it] encourage[s] invention ... and ... prompt[s] the independent innovator to proceed with the discovery and exploitation of his invention." *Id.* at 485. Protection of such information ultimately

> "encourages businesses to initiate new and individualized plans of operation, and constructive competition results. This, in turn, leads to a greater variety of business methods than would otherwise be the case if privately developed

[1] In addition to the patent, copyright and trademark laws, Congress has specifically provided in a number of statutes for the protection of trade secrets and confidential business information. *E.g.*, 15 U.S.C. § 2613; 18 U.S.C. § 1905; 21 U.S.C. § 331(j); 42 U.S.C. § 1857h-5(a)(i).

[2] See, *e.g.*, N.J.Stat.Ann. Title 2A, § 119-5.2 (West 1969); Ill. Rev. Stat., Ch. 111½, § 1001 *et seq.* (1977).

marketing and other data were passed illicitly among firms involved in the same enterprise." *Id.* at 483; *see also Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 576 (1977).

In *Kewanee*, the Court also expressly observed that the intellectual property laws were designed not only for the public good but also to protect the interests of the individual owner of trade secrets or confidential commercial information: "A most fundamental human right, that of privacy, is threatened when industrial espionage is condoned or is made profitable . . ." 416 U.S. at 487 (footnote omitted).

This notion of the individual's interest in the protection of trade secrets and confidential business information is intimately tied to the fact that these types of information are protectable forms of property[3] which are as entitled to protection from misappropriation as the tangible product whose manufacture they make possible. The trade secret, patent, trademark, copyright and unfair competition laws all embody a respect for the property interest which a business or individual has in its formula, design or process, and are designed to protect that interest from infringement, whether direct or illicit.

---

[3] *See United States v. General Motors*, 323 U.S. 373, 377-78 (1945). *See also* Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act (June 1967), at 34, where the Attorney General recognized that "formulae, designs, drawings, research data, etc., which though set forth on pieces of paper, are significant not as records but as *items of valuable property.*" (Emphasis added) As to such information, the Attorney General's Memorandum said: "There is no indication . . . that the Congress intended . . . to give away such *property* to every citizen or alien who is willing to pay the price of making a copy. Where similar *property* in private hands would be held in confidence, such *property* in the hands of the United States should be covered under exemption . . . (4)." *Id.* (emphasis added).

These related principles clearly evidence that "[a] national policy exists which protects confidential business information." *USS-OCF-W&M* v. *Eckerd*, No. 76-1933 (D.D.C., Dec. 9, 1976). The protective umbrella of this policy covers such information not only while in private files, but also when furnished by businesses to the federal government for limited regulatory purposes. Thus, as Mr. Justice Marshall observed in *Kewanee*, "Congress has in a number of instances given explicit federal protection to trade secret information *provided to federal agencies. See, e.g.*, 5 U.S.C. § 552(b)(4); 18 U.S.C. § 1905 . . ." *Kewanee Oil Co.* v. *Bicron Corp.*, 416 U.S. at 494 (emphasis added). These and other statutes reflect that confidential business information which would otherwise be protected from misappropriation is not stripped of that protection merely because it is furnished to a government agency for some specific regulatory purpose.

2. The information at issue in this case is precisely the type of information which has traditionally been protected by these confidentiality laws from misappropriation or impairment. The documents contain highly detailed statistical and narrative data which show the composition, deployment and utilization of the labor forces in two of Petitioner's automobile assembly plants. This information represents a significant part of the "know how" which Petitioner has developed in the automobile industry over the years as a result of research, innovation, experimentation, and the investment of great sums of money; it reflects the manner in which Petitioner deploys its labor force to obtain the highest quality assembly of the greatest number of vehicles at the lowest possible cost; and it reveals those unique aspects of Petitioner's assembly process—including its deployment of personnel, types of equipment, and assembly techniques—which set it apart, for good or for bad, from its competitors. Such

information, as the district court found, is not available to Petitioner's competitors through any source other than these documents (Pet. App. B, pp. 50a-51a) and, if disclosed, could cause substantial competitive injury to Petitioner (Pet. App. B, pp. 51a-52a).

The point of this discussion is not to reargue the factual issues of this case but, rather, to illustrate to the Court the type of highly valuable information which Petitioner, like countless other government contractors and regulated businesses, must submit to federal agencies on a recurring basis.[4] The fact that this data is submitted for the purpose of demonstrating Petitioner's compliance with equal employment requirements and not because the Government "wants to know how to make automobiles" (Resp. Br. 29) does not mitigate the considerable competitive injury which public disclosure of this information will cause. Nor does the fact that essentially private documents may have "public aspects" (Resp. Br. 30) obviate the prejudicial effects of, or warrant, disclosure of such information.[5] For, shorn of any official labels or titles which may be attached to these documents under Respondents' regulations, they are in fact a detailed handbook of Petitioner's labor deployment, one of the most technical and secret aspects of its automobile assembly process, which has been developed by Petitioner "at the cost of enterprise, organization, skill, labor, and money." *International News Service* v. *Associated Press,* 248 U.S. 215, 236 (1918). Moreover, regardless of the reason why

[4] See Briefs Amicus Curiae of Scientists & Engineers For Secure Energy *et al.,* at 2-6; Standard Oil Company of California, at 2 and Appendix; Chamber of Commerce of the United States, at 4-6; and National Security Industrial Association, at 3-6.

[5] The same might be said of an individual's or corporation's federal income tax return, the disclosure of which is forbidden by 26 U.S.C. § 7213(a).

Respondents collected the data in the first instance, the fact of the matter is that there are companies with whom Petitioner competes in the automobile and allied industries who are keenly interested in Petitioner's manufacturing techniques and who would, if they could obtain that data under the FOIA, utilize it to Petitioner's detriment.[6]

If one of Petitioner's competitors sought to obtain this or any comparable information from Petitioner's files by "improper means",[7] the trade secret and unfair competition laws would protect Petitioner from such a misappropriation of its property and invasion of its privacy. *Kewanee Oil Co.* v. *Bicron,* 416 U.S. at 175-76 & n. 5 and cases cited therein. Yet, the lower court's construction of the FOIA, and Exemption 4 in particular, turns this two century tradition on its ear by rendering freely available from government files some of the very same information which, absent Petitioner's consent, a competitor could not acquire without recourse to industrial espionage or other anticompetitive practice;[8] indeed, this fact has not been

[6] Likewise there are litigants who seek information under the FOIA which has been denied to them elsewhere by court order in discovery, who would also use such information to Petitioner's detriment. Pet. Br. 26-28. This Court recently observed "that FOIA was *not* intended to function as a private discovery tool, see *Renegotiation Board v. Bannercraft Clothing Co.,* [415 U.S. 1, 22 (1973)]." *NLRB v. Robbins Tire and Rubber Company,* 98 S.Ct. 2311, 2327 (1978). While that observation was made in a case involving use of the FOIA to obtain broader discovery of the agency's case than the agency's own discovery rules allowed, presumably use of the Act in circumvention of the Federal Rules of Civil Procedure or agency discovery rules in order to obtain otherwise nondiscoverable information relating to private persons is equally abhorrent.

[7] Restatement of Torts § 757(a) (1939).

[8] Allowing competitors and others to obtain Petitioner's business records indirectly from federal agencies when they could not obtain such information directly from Petitioner is contrary to the equitable maxim that courts should not allow by indirection what the law or its policy forbids from being done directly. *See Colonial Trust Company v. Goggin,* 230 F.2d 634, 637 (9th Cir. 1955).

overlooked as witnessed by the fact that industrial surveillance has become a principal use of the FOIA.[9] This result is as unnecessary as it is undesirable, in light of the fact that there are alternatives to disclosure of private business information which would satisfy the public's need to know and yet avoid the injury which disclosure of such information is likely to cause.[10]

This same notion compels the conclusion that agency reports or other documents "generated wholly within an agency *** [which] may be predominately or even exclusively reports on or copies of information submitted by private persons" (Resp. Br. 30 n. 16) should be withheld from disclosure to the same extent that the private information which they contain would be entitled to such protection.

[9] Pet. Br. 22-26. The so-called "public" disclosure of Petitioner's documents under the FOIA is in fact disclosure to individual persons, among them competitors, who seek that confidential business data for *private* use which will diminish, and in some cases destroy, Petitioner's interest in the documents. The expropriation of Petitioner's private property, for private purposes and without compensation, raises serious questions concerning this aspect of the FOIA under the Fifth Amendment. *See United States v. Basic Products Co.*, 260 F. 472, 482 (W.D.Pa. 1919); *Polaroid Corp. v. Costle*, No. 78-1133-S (D.Mass., June 22, 1978) (where the district court found a reasonable likelihood that the Toxic Substances Control Act, 15 U.S.C. § 2601 *et seq.*, which provides for disclosure of confidential information without affording the submitter notice or an opportunity for hearing and judicial review, constitutes an unlawful deprivation of property without compensation or due process of law). See Pet. Br. 24 n. 26.

[10] For example, a number of reports have been issued by the Department of Labor, by "watchdog" agencies and by Congress which objectively examine in detail the extent to which the affirmative action program pursuant to which Petitioner's documents were submitted is being properly administered, areas where enforcement has been lax, and steps which can be taken to improve the program. See, *e.g.*, Dept. of Labor, "Preliminary Report on the Revitalization of the Federal Contracts Compliance Program" (Sept. 1977); General Accounting Office, "The Equal Employment Opportunity Program for Federal Nonconstruction Contractors Can Be Improved", G.A.O. MWD-75-63 (April 29, 1975).

Similarly, where individual companies have failed to comply with regulatory requirements, procedures exist which bring such

The decision below undermines the balance struck by Congress by vesting in government bureaucrats the power to superimpose their own perception of the need for disclosure on Congress' and the States' judgment that our society will be benefited by maintaining the confidentiality of business data. For reasons ranging from agencies' lack of expertise in appraising the disclosability of assertedly confidential data (Pet. Br. 76-77), to the post-Watergate climate in which disclosure has become more expedient than withholding, the simple fact is that agencies too often have struck a balance which sacrifices the very same property and privacy rights which the trade secret and unfair competition laws were designed to safeguard and whose protection was deemed essential to the economic growth of the Nation.

It is in this broader perspective that it becomes apparent that, in including Exemption 4 in the FOIA, Congress did not intend to invest agencies with the day to day authority to vitiate the trade secret laws in the course of deciding whether to disclose materials which are clearly

---

matters to public attention and allow for public participation in enforcement. For example, the names of contractors who have been determined to be in violation of applicable laws and against whom sanctions are proposed, the action to be taken, and decisions regarding such matters are published in the Federal Register. Executive Order 11246 § 209(a)(1).

Finally, where disclosure to the public of statistical data is desirable but where none of the alternatives noted above is feasible, the data can be released to the public in aggregate form in such a manner as to preserve the confidentiality of the individual company's information. This practice is uniformly followed by agencies such as the Department of the Census, the Bureau of Labor Statistics and the Bureau of Foreign and Domestic Commerce. See 13 U.S.C. § 9(a)(2); 15 U.S.C. § 176(a); and 29 C.F.R. § 2.4(a) and (b).

exempt from disclosure under Exemption 4.[11] Instead, as we explained in our opening brief, Congress itself permanently struck that balance when it enacted 18 U.S.C. § 1905 and affirmed it by including Exemption 4 in the FOIA.[12] Only by interpreting the fourth exemption in this manner so as to "assure" the confidentiality of trade secrets and confidential business information, can the Court effectuate the disclosure philosophy of the FOIA without doing violence to the principles underlying the business confidentiality laws.[13]

II. The Legislative History Of The FOIA And The 1974 Amendments Shows That Exemption 4 Was Intended To Assure The Confidentiality Of Trade Secrets And Private Business Information

Respondents argue that the legislative history of the Freedom of Information Act and of the 1974 amendments to the Act reflects that the FOIA exemptions were intended to be "permissive" in nature. Resp. Br. 18-27. This assertion reveals Respondents' misunderstanding of what records the Act was, *and was not,* intended to expose

[11] *See Lee Pharmaceuticals v. Kreps,* 577 F.2d 610, 617 (9th Cir. 1978) ("Absent the clearest of congressional direction, we would not attribute to Congress an intent to undercut the patent system and to vitiate protections uniformly provided since the institution of patent application procedures, in the guise of making the workings of government more open and accessible to the public.")

[12] "A central aim of the Freedom of Information Act has been to substitute legislative judgment for administrative discretion." *American Jewish Congress v. Kreps,* No. 75-1541 (D.C.Cir., March 15, 1978), Slip Op. at 9 n. 34; *see Lee Pharmaceuticals v. Kreps,* 577 F.2d at 614.

[13] And only by guaranteeing the confidentiality of such information can the Court ensure that businesses will continue to willingly furnish necessary information to government agencies. Pet. Br. 31-32. *See Sears, Roebuck & Co. v. EEOC,* 17 F.E.P. Cases (B.N.A.) 897, 902 (D.C.Cir. June 9, 1978); *Burlington Northern Co. v. EEOC,* 17 F.E.P. Cases (B.N.A.) 1358, 1360 (7th Cir. Aug. 15, 1978).

to public scrutiny, and distorts the content and significance of the legislative history of both the Act and the 1974 amendments.

A. The 1967 Legislative History Shows That Congress Intended Exemption 4 To Be Applied In A Mandatory Fashion

The Freedom of Information Act was intended to remedy the excessive withholding by federal agencies of information relating to agency actions. *Dept. of Air Force* v. *Rose,* 425 U.S. 352, 360-61 (1976). The Act was not designed to expose to public scrutiny confidential business information. Consequently, the main thrust of the Act, and the main subject of the legislative history, was the reversal of agencies' practice of shielding potentially embarrassing or incriminating *agency* information from disclosure.[14] It is understandable, then, that even though Congress recognized that some agency information should *not* be disclosed in certain circumstances, and that exemptions from disclosure were therefore necessary, the nondisclosure of such agency records was to be only discretionary, not mandatory; and, even where exempt, it was contemplated that agency information *would* be disclosed unless release would demonstrably impair government interests.

Congress' approach to the confidentiality of *private* documents is in marked contrast. While Congress sought to frame the FOIA exemptions in such a way as to restrict the extent to which agencies could shield agency information from disclosure merely by designating it as confidential, it did not intend or attempt to interfere with

[14] The language of the Act itself reveals that the FOIA's primary purpose was to inform the public about *agency* matters (i.e., agency organization, rules of procedure, policies, rulings, opinions, staff manuals, etc.). See 5 U.S.C. § 552(a)(1) and (a)(2).

legitimate claims of confidentiality on the part of businesses or other private persons. *See, e.g.,* 110 Cong. Rec. 17086-87 (July 28, 1964) (statement of Sen. Long). The bill which became the FOIA was presented by the House and Senate reports, and was understood by witnesses, as making no change in the treatment of documents submitted by private parties under a claim of confidentiality.[15] This is not surprising since the Act and Exemption 4 reflect "the national policy which . . . protects confidential business information *** compiled through an owner's efforts, skills, and resources" from disclosure. *USS-OCF-W&M* v. *Eckerd,* No. 76-1933 (D.D.C., December 8, 1976).

The legislative history of the Act and the exemptions reflects this dichotomy. When speaking of the exemptions in general—i.e., of an agency's judgment that an exemption should shield *agency* information from public disclosure—Congress indicated that the exemptions were intended to afford only limited protection and were to be sparingly invoked. *See, e.g.,* H.R.Rep.No. 1497, 89th Cong., 2d Sess. 7-10 (1966) ("H.R. Rep.No. 1497"), *reprinted in* [1966] U.S. Code Cong. & Adm. News 2418. However, when referring specifically to Exemption 4 and the protection which it was to provide to *private* business information which was confidential in nature, Congress' remarks were imperatives which indicated that such information *must* be protected from public disclosure. Pet. Br. 14-18; *see, e.g.,* H.R.Rep.No. 1497 at 10.

[15] The statements made during the course of the 1963 hearings on the bill which became the FOIA (which, at that point, contained no exemption for trade secrets or confidential commercial information) reflect that the witnesses sought absolute, not merely discretionary, protection from disclosure of confidential business information (Pet. Br. 15-16); and the addition of Exemption 4 in response to those statements shows that the Exemption was intended to be of a mandatory nature. See Resp. Br. 29 n. 15.

Thus, the 1967 legislative history referred to by Respondents, while possibly germane to the question of agency authority to disclose *agency* information which falls within an exemption, is inapposite to the issue of agency discretion to disclose *private* business information which falls within Exemption 4 because it is confidential in nature.[16] As to such information, the 1967 legislative history demonstrates that it was Congress' intent that the FOIA *assure* confidentiality.

B. The Legislative History of the 1974 Amendments Does Not Establish That Exemption 4 Must Be Applied In A Permissive Manner

Respondents seek to derive principal support for their argument that Exemption 4 is permissive in nature from the legislative history underlying the 1974 amendments to the Freedom of Information Act. Respondents' reliance on the 1974 amendments is misplaced for three reasons.

First, Respondents have referred the Court to statements which speak only generally of all of the FOIA exemptions, not specifically of Exemption 4. In this regard, it is important to recall the climate in which the 1974 amendments to the Act were passed. In the years following enactment of the FOIA in 1966, federal agencies showed their reluctance to apply the disclosure provisions

[16] Similarly, while the Attorney General's Memorandum referred generally to the need to disclose some exempt documents (Resp. Br. 22), its specific references to Exemption 4 and business information show that it too construed Exemption 4 in a mandatory fashion. Pet. Br. 17-18. Likewise, although this Court has recognized some discretion by federal agencies to disclose exempt *agency* documents and information (Resp. Br. 19 and cases cited therein), it has never suggested that, or considered whether, agencies have discretion to disclose confidential business information which falls within Exemption 4. See, *e.g., EPA v. Mink,* 410 U.S. 73 (1973), where the Court's remarks were rendered in the context of Exemption 1.

of the Act to agency information. *See* H.R.Rep.No. 92-1419, 92nd Cong., 2d Sess. 8-11 (1972). Consequently, when Congress considered the 1974 amendments, its focus was on, and its purpose was to reverse, the recalcitrant attitude of federal agencies in complying with the disclosure mandate of the FOIA. The statements relied upon by Respondents reflect Congress' opinion that the exemptions from disclosure applicable to *agency* information were only permissive, not mandatory, in nature and that, absent compelling reasons for withholding of such information, it would be contrary to the purpose of the FOIA for agencies to exercise their discretion to withhold such agency records. Nothing in the 1974 legislative history, however, shows any intent by Congress to reverse the longstanding policy, which was recognized in the 1967 legislative history and codified in Exemption 4 of the FOIA, of safeguarding the confidentiality of *private* business information compiled at private expense and furnished to the Government for limited regulatory purposes.

Second, statements in the 1974 legislative history do not constitute a part of Exemption 4's legislative history because they do not reflect Congress' intent *at the time Exemption 4 was enacted. Pet. Br. 18-19 & n.18. Where subsequent legislative action does not expressly affect the section of the statute under consideration,* "[*t*]*he views expressed by particular legislators as to the meaning of that* [*section*] *'cannot serve to change the legislative intent of Congress . . . since the statements were* [*made*] *after the passage of the Act.'* " *Illinois Brick Co.* v. *Illinois,* 431 U.S. 720, 733 n. 14 (1977), *quoting Regional Rail Reorganization Act Cases,* 419 U.S. 102, 132 (1974). Here, although statements made during the course of the 1974 amendments to the FOIA may "give meaning to the [1974] amendments and their relationship to the statute" (Resp.

Br. 25), they do not affect the meaning of Exemption 4 because they did not expressly or implicitly address the question of whether *Exemption 4* was permissive or mandatory in nature. Moreover, to the extent the statements could be construed to address Exemption 4, since Congress undertook no amendment of the fourth exemption, those statements would, at most, constitute merely "the views of a subsequent Congress [and] form a hazardous basis for inferring the intent of an earlier [Congress]." *United States* v. *Paine,* 361 U.S. 304, 313 (1960); *Regional Rail Reorganization Act Cases,* 419 U.S. at 132.[17]

Finally, the fact that Congress did not amend Exemption 4 in the course of the 1974 amendments to the FOIA does not reflect, as Respondents assert (Resp. Br. 23-26), that Congress approved of a permissive construction of the fourth exemption. In enacting the 1974 amendments, Congress simply did not focus on this aspect of Exemption 4 or the related question of the disclosability of *private* business documents.[18] Thus, the 1974 legislative

---

[17] The same may be said of the contention by Amici Consumer Federation of America ("CFA") *et al.* that Congress "endorsed" the *National Parks* test for FOIA Exemption 4 (see *National Parks and Conservation Assn. v. Morton,* 498 F.2d 765 (D.C. Cir. 1974)) by adopting the same exemption in the Government in the Sunshine Act, Public Law No. 94-409, 90 Stat. 1241 (1976). Amici Br. 15 n. 21; see Pet. Br. 19 n. 19. References in the legislative history of the Sunshine Act to congressional "recognition of judicial interpretation" of the fourth exemption to the FOIA are hardly dispositive of the intent of Congress in enacting Exemption 4 over ten years earlier. Moreover, the most recent discussion of the *National Parks* test by the House Committee on Government Operations does *not* endorse, much less ratify, the *National Parks* test. *See* H.R.Rep.No. 95-1382, 95th Cong. 2d Sess. 21-22 (1978).

[18] An amendment of Exemption 4 was proposed in the House in response to criticism that the relationship of the compound elements of Exemption 4 ("commercial or financial", "obtained from a person", and "privileged or confidential") was difficult to understand. *See,* Administration and Operation of the Freedom of Information

history, while pertinent to other sections of the FOIA,[19] provides no basis to impute approval by Congress of any mode of applying Exemption 4, whether mandatory or permissive.[20] Moreover, even if Congress' failure to amend Exemption 4 in 1974 reflected approval of the manner in which the Exemption was being applied, it would not be

Act, Hearings Before the House Comm. on Gov't. Operations, Subcomm. on Foreign Operations and Gov't. Information, 92nd Cong., 2d Sess., Part 4 at 1077, Part 5 at 1436, Part 6 at 1849, 2156 (1972). The amendment was later killed because of Congress' conclusion that this aspect of Exemption 4 was being correctly construed by the courts. *See* S.Rep.No. 93-854, 93rd Cong., 2d Sess. 7 (1974) ("S.Rep.No. 93-854"). The proposed amendment, and Congress' conclusion that it was unnecessary, bore no relationship to the question of whether Exemption 4 was mandatory or permissive in nature.

[19] Most of Congress' remarks concerning the permissive nature of the exemptions were made in the course of amending Exemption 1. That exemption, which relates to disclosure of classified information, clearly was designed to protect governmental, not private interests, thereby accounting for its permissive nature. *See, e.g.*, S.Rep.No. 93-854 at 6.

[20] The decisions of this Court cited by Respondents (Resp. Br. 24-26) are to the same effect. For example, in contrast to this case, the Court was presented with an entirely different situation in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), where "Congress [had] not just kept its silence by refusing to overturn the administrative construction, but [had] ratified it with *positive legislation.*" *Id.* at 381-82 (footnote omitted) (emphasis added). Here, in contrast, there was no "[s]ubsequent legislation declaring the intent" (*id.* at 380) of Congress with respect to Exemption 4, nor even any legislative history expressly addressing the Exemption; there was only congressional silence.

Likewise, in *FAA Administrator v. Robertson*, 422 U.S. 255 (1975), which dealt only with Exemption 3, the Court simply found no intention by Congress in the 1974 amendments to the FOIA to depart from its original intent as to Exemption 3. In this case, however, Respondents argue that post-Act statements should be read to support a permissive construction of Exemption 4 which radically departs from Congress' original intent, as expressed in the 1967 legislative history, that the fourth exemption *guarantee* confidentiality.

clear whether it was approving a permissive or a mandatory approach for, at the time of the 1974 amendments, some courts were applying Exemption 4 on a mandatory basis (*e.g., Westinghouse Electric Corp.* v. *Schiesinger*, 392 F.Supp. 1246 (E.D.Va. 1974)). Consequently, the original intent of Congress in 1967 should govern.[21]

III. Disclosure Of Petitioner's Documents Pursuant To OFCCP Regulations Will Violate 18 U.S.C. § 1905

Since as early as 1864, Congress has recognized that laws granting government agencies the right to inspect private business records and premises impose a corresponding duty on the Government, its agencies, and their employees to prevent public dissemination of confidential commercial information,[22] which may to a large extent constitute "the great value of the business itself." 26 Cong. Rec. 6893 (1894) (remarks of Sen. Aldrich). 18 U.S.C. § 1905, like the three prior non-disclosure laws upon which it is based, reflects a congressional intent to provide *legal assurance* to businesses that the confidentiality of valuable commercial data supplied to the Government would not be breached. Pet. Br. 40-44.

Seeking to avoid the prohibition of § 1905, Respondents assert that Congress intended that agency regulations, which generally have the "force and effect of law", provide the requisite "authorization by law" to divulge confidential commercial information whose disclosure is otherwise prohibited by § 1905 (Resp. Br. 38-45); and that agency disclosure regulations issued under 5 U.S.C.

[21] *See United States v. Wise*, 370 U.S. 405, 411 (1962) ("Logically, several equally tenable inferences could be drawn from the failure of Congress to adopt an amendment . . .").

[22] *See* Revenue Act of 1864, ch. 173, §38, 13 Stat. 223; *Whalen v. Roe*, 429 U.S. 589, 605 (1977).

§ 301, Executive Order 11246 or the FOIA, properly limit the applicability of § 1905 (Resp. Br. 45-53). Respondents misperceive the history, scope and purpose of § 1905.

A. Agency Regulations Do Not Constitute Authorization "By Law" Within the Meaning of § 1905

1. The broad principle that agency regulations have the "force and effect of law"[23] does not, as Respondents profess (Resp. Br. 38), lead to the conclusion that agency disclosure regulations can undercut the contradictory statutory policy of nondisclosure expressed in § 1905. As the legislative history of § 1905 demonstrates, Congress did not, in the specific context of 18 U.S.C. § 1905, equate authorization "by law" with authorization "by regulation." Pet. Br. 45-47.

This fact is apparent from a review of the various enactments of Rev. Stat. § 3167, the original income tax non-disclosure law on which § 1905 was, in part, based.[24]

[23] Respondents' reliance on *General Services Administration v. Benson*, 415 F.2d 878 (9th Cir. 1969), and other authorities cited at Resp. Br. 38 n. 24, is misplaced. Those cases deal with the *general* status of agency regulations and do not involve the issue of whether agency regulations constitute "authorization by law" *within the context of §1905*. Likewise, the cases cited by Respondents at nn. 22 & 23 and the accompanying text of their brief in fact confirm that, although non-agency directives to disclose—such as a specific statutory direction or judicial order—do constitute authorization "by law" under §1905, agency regulations do not. Pet. Br. 45-46. This is because recognition of agency disclosure regulations as a source of "authority" under §1905, absent an express statutory direction by Congress that the agency may disclose such documents, would be tantamount to making the goat the keeper of the cabbage patch. Pet. Br. 43-44 & n. 49.

[24] In its opening brief, Petitioner pointed out that the 1878 amendment to another revenue provision, Rev. Stat. §3165, permitting revenue agents to administer oaths "where such oaths are

Section 3167 provided the basis both for § 1905 and for 26 U.S.C. § 7213(a) (1954), the latter of which prohibited disclosure of income tax returns "in any manner whatever not provided by law". Although, as Respondents note, courts construed § 7213(a) to permit disclosure of income tax returns pursuant to agency regulations (Resp. Br. 43), those authorities lend no support to Respondents' argument; for Respondents have overlooked the fact that Congress has, in another *statute* (26 U.S.C. § 6103(a)), expressly authorized the Secretary of the Treasury to promulgate regulations governing inspection of the tax returns whose disclosure is otherwise prohibited by § 7213(a).[25]

authorized by law or regulation authorized by law to be taken", indicates that the contemporaneously enacted authorized "by law" language in Rev. Stat. §3167 (the predecessor of §1905) was intended to exclude agency regulations. Pet. Br. 44-45. Respondents contend that the change in Rev. Stat. §3165 was intended only to make clear the Commissioner's power to issue regulations. Resp. Br. 40-41 n. 25. In fact, as the remarks of Rep. Scales reveal, the Commissioner's power to issue regulations was virtually unquestioned: "[H]is power to make regulations in regard to these revenue laws is almost unlimited." 7 Cong. Rec. 4006 (1878). Moreover, the legislative history of §3165 demonstrates that the 1878 Congress expressly recognized the distinction between authorization "by law" and authorization by regulation, as the following colloquy reveals:

> Mr. Scales. "Is not the collector authorized by law to take oaths under the *law* as it is now?
>
> Mr. Tucker. "Under the *law*, but *not under the regulations* of the Department . . ." *Id.* (emphasis added).

[25] Respondents inaccurately state that Congress amended §7213(b) in 1976. Resp. Br. 43-44 n. 30, *citing* Pub.L. 94-455, Title XII, §1202(h)(3). Congress did not amend §7213(b) but did amend §7213(a)(1), prohibiting disclosure of income tax returns "except as authorized in this title." Pub. L. 94-455, Title XII, §1202(d). However, this amendment does not demonstrate, as Respondents suggest, that the prior terminology of §7213(a)(1) (authorized "by law") included authorization by "regulation." Resp. Br. 43-44 n. 30. For, Respondents have ignored the fact that even prior to the 1976 amendment, §7213 contemplated disclosure pursuant to agency regulations *only* to the extent that those regulations were specifically

Other statutory enactments subsequent to the codification of § 1905 in 1948 similarly reflect that Congress intended that, absent express statutory direction, agency regulations could not constitute authorization "by law" for disclosure of information falling within the scope of § 1905. Since 1948, Congress has passed numerous statutes which identify various documents whose disclosure is prohibited as provided in § 1905.[26] In contrast, during that period Congress enacted some other statutes which specifically "authorize" agencies to disclose information otherwise protected by § 1905 if necessary to protect the "public health and safety."[27] These statutes, like Rev. Stat. § 3167, reveal that where Congress has intended to authorize an agency to disclose documents which fall within § 1905, it has done so only by *express* statutory direction. There is no such authorization for Respondents' release of Petitioner's documents or for the regulations pursuant to which the threatened action was to occur.

---

authorized by Congress in 26 U.S.C. §6103, and not disclosure pursuant to regulations promulgated under general agency rulemaking authority. See 26 U.S.C. §6103 (1954). The 1976 amendment to §7213, which provided for disclosure "as authorized in this title" did not signal a new restriction on the Treasury Secretary's general rulemaking authority, but only added a specific cross-reference to the more precise delineation of the Secretary's authority to disclose which Congress included in amending §6103. See Pub. L. 94-202, §8(g), 89 Stat. 1139 (1976). Consequently, the change in §7213(a)'s terminology was only cosmetic and, contrary to Respondents' contention, shows that Congress intended that regulations constitute authorization by law *only* when those regulations were *specifically* provided for by statute.

[26] See, *e.g.*, 15 U.S.C. §§1401(e), 1193(c), 1914(b), 1944(f), 1990d(d) and 2055(a)(2); 33 U.S.C. §1322(g)(3); 42 U.S.C. §4912(b); 46 U.S.C. §1463(b); and 49 U.S.C. §1681(d).

[27] See, *e.g.*, 15 U.S.C. §§1402(d), 1418(a)(2)(B) and 2217; 42 U.S.C. §263g(d); and 49 U.S.C. §1905(b).

2. Respondents concede that the Department of Labor has, in 29 C.F.R. § 70.21(a), directly applied § 1905 to its officers, employees and agents.[28] Resp. Br. 43 n. 29. However, they argue that § 1905 has no impact whatsoever on *agency* disclosure policies but was instead merely intended to protect the public from abuses by unscrupulous and profiteering government employees. Resp. Br. 39-44.

Respondents' argument ignores the fact that two of the three preexisting nondisclosure laws on which § 1905 is based were directly applicable to formal agency action.[29] Moreover the fact that § 1905's sanctions cannot be

---

[28] Amici CFA *et al.* contend that despite §1905's clear and precise terminology, the statute should be deemed to apply only to those materials which fall within the scope of the three preexisting nondisclosure laws on which §1905 was based. Amici Br. 20-31. Amici's argument is without merit. Amici's contention that §1905, a codification of prior laws, precludes disclosure only of income tax returns, or statistical information submitted to the Tariff Commission and Commerce Department, rests on the assumption that Congress in enacting §1905 "inadvertently" and "unintentionally" drafted a plainly worded statute whose literal meaning must be disregarded in favor of the much narrower construction which Amici urge. Apart from attributing to Congress extreme ineptness in legislative drafting, Amici's position overlooks the facts that two of the predecessor statutes on which §1905 was based clearly applied to much broader categories of information; that courts have applied §1905 to a broader array of information than merely those mentioned by Amici (*see, e.g., FCC v. Cohn,* 154 F.Supp. 899 (S.D.N.Y. 1957)); and that §1905 has been treated by this Court as applicable to the employees of the United States or of *any* department or agency of the United States, not just those of the agencies to which the predecessor statutes applied. *St. Regis Paper Company v. United States,* 368 U.S. 208, 219 (1961).

[29] 15 U.S.C. § 176a (1940); 19 U.S.C. §1335 (1940). While Respondents concede that the Commerce Department statute imposed restrictions directly on the agency, they assert that, unlike the other two preexisting nondisclosure laws, the Commerce statute contained no criminal penalties (Resp. Br. 42). This contention is erroneous. 15 U.S.C. §176b (1940) provided that any employee of the Bureau of Foreign and Domestic Commerce who violated §176a

imposed directly on a federal agency does not relieve the agency of its responsibility to ensure compliance with the statutory mandate of nondisclosure, as both courts and Congress have recognized.[30] Factors such as these have led the Attorney General on two separate occasions to conclude that 18 U.S.C. § 1905 imposes restraints upon formal agency action. Pet. Br. 39 n. 45.

B. Neither 5 U.S.C. §301, The FOIA Nor Executive Order 11246 Provides Authority For Adoption Of Agency Regulations Limiting The Applicability of § 1905

Event if appropriate agency regulations could authorize disclosure of materials within the scope of 18 U.S.C. § 1905, neither 5 U.S.C. § 301, Executive Order 11246, nor the FOIA authorizes the adoption of disclosure regulations such as OFCCP's which are in derogation of § 1905 and FOIA Exemption 4. Pet. Br. 47-55.

1. 5 U.S.C. § 301 was originally enacted to enable agencies to promulgate regulations necessary to carry out their day-to-day activities. When Congress amended §301

---

was to be deemed guilty of a misdemeanor and subject to a $1,000 fine upon conviction.

Respondents also assert that Rev. Stat. §3167, 18 U.S.C. §216, one of §1905's predecessors, was intended only to prevent abuses by "poorly paid revenue agents." (Resp. Br. 40 n. 26). However, the 1894 debates, viewed in their entirety, reflect explicit congressional intent to protect the value of the *information* itself, not merely to curb the venality of revenue agents.

[30] See *FCC v. Cohn*, 154 F. Supp. 899 (S.D.N.Y. 1957) where, in barring *the FCC* from disclosing a variety of business information found to be within the scope of 18 U.S.C. §1905, the court necessarily concluded that §1905 operates as a restraint on *agency* action. Similarly, the numerous statutes enacted subsequent to 18 U.S.C. §1905 which require *agencies* to preserve the confidentiality of information falling within the scope of §1905 reveal that Congress has expressly assumed that §1905 is directly applicable to agency action. See n. 27 and accompanying text, *supra*.

in 1958 to prevent the use of agency "housekeeping" authority to improperly withhold documents from Congress and the public, numerous legislators took pains to point out that the proposed amendment would not affect the right or the *duty* of agencies to withhold from the public information which Congress, in some 78 other statutes (including §1905), had declared was not to be disclosed. Pet. Br. 49. These were not, as Respondents suggest, isolated views of a few legislators; rather, as the 1958 debates reveal, they reflect the "sense of the House" that the proposed amendment was not intended to permit agencies to disclose information whose availability was otherwise limited by statute.

For example,[31] in addressing the effect of the proposed amendment to § 301, Rep. Brown remarked:

> "It would *still be a violation of law* for any agency of Government or any Government official to make public any of the records for which secrecy is provided by any of some 78 separate statutes." 104 Cong. Rec. 6548 (1958) (emphasis added).

In the same vein, Rep. Cramer stated that the bill was not intended to permit

> "indiscriminate rummaging through of Government information . . . where Congress had declared it in the public interest to withhold this information. *** This bill writes no *new* rule for the Government agencies as to making available information which does not now exist . . ." 104 Cong. Rec. 6566 (1958) (emphasis added).

---

[31] *See also* 104 Cong. Rec. 6558 (remarks of Rep. Fascell); *id.* at 6564 (remarks of Rep. Wright); *id.* at 6567 (remarks of Rep. May); *id.* at 15688 (remarks of Sen. Johnson).

And Rep. Fascell concluded that § 301 did not constitute an *independent* source of authority to disclose:

> "[T]he very purpose of the statute is to give the department head authority to regulate the conduct or operation of his department. It has nothing to do with, *it is separate and apart completely from the question whether or not information is or is not to be made available to a particular individual* . . . In other words, if [information] is available under *other law,* that is the criterion." 104 Cong. Rec. 6560 (1958) (emphasis added).[32]

In short, the sole objective of the 1958 amendment was to "neutralize" § 301 by returning it to the purpose for which it was originally enacted in 1789,[33] *not,* as Respondents contend, to reaffirm agency power to promulgate

[32] Respondents' reliance (Resp. Br. 52) on a statement by Rep. Fascell to the effect that a proffered amendment—which provided that §301 should not be construed to require agencies to make records available—would "raise the contrary presumption that [the agency] shall not have the right to make information and records available", 104 Cong. Rec. 6569 (1958), is misplaced. For, Respondents ignore Rep. Fascell's recognition that a record's "availability" must be determined by reference to "other law". 104 Cong. Rec. 6560 (1958).

[33] "This bill would return [§301] to what appears to have been the original purpose for which it was enacted in 1789. . . . The law has been called an office 'housekeeping' statute enacted to help General Washington get his administration underway by spelling out the authority for executive officials to set up offices and file Government documents. The documents involve day-to-day business of Government which are *not restricted under other specific laws* nor classified as military information or secrets of state." H.R. Rep. No. 1461, 85th Cong., 2d Sess. (1958), *reprinted in* [1958] U.S. Code Cong. & Adm. News 3352 (emphasis added).

disclosure regulations in derogation of a statutory prohibition on disclosure such as 18 U.S.C. § 1905.[34]

2. Executive Order 11246 is equally unavailing as a source of authority for the adoption of disclosure regulations in derogation of the clear statutory prohibition on disclosure contained in 18 U.S.C. § 1905; for executive orders, while generally having the "force and effect of the law", do not provide blanket authority for regulations or actions which are in conflict with contradictory congressional expressions.[35] Moreover, the fact is that § 401 of Executive Order 11246 explicitly restricted the authority of

[34] The power which Respondents assert under §301 has not received the broad, historical support which Respondents, like the court below, attribute to this Court's decisions in *FCC v. Schreiber,* 381 U.S. 279 (1965), *Isbrandtsen-Moller Co. v. United States,* 300 U.S. 139 (1937), and *Norwegian Nitrogen Products Co. v. United States,* 288 U.S. 294 (1933). Resp. Br. 49. As Petitioner noted in its opening brief, none of these decisions directly considered whether §301 constituted a basis for promulgation of regulations permitting disclosure of information *within the scope of 18 U.S.C. §1905* (Pet. Br. 51 n. 54); in fact, the disclosures involved in *Schreiber* and *Norwegian Nitrogen Products* were held permissible under specific statutory authority contained in the agencies' enabling statutes, *not* §301 which applies only to executive departments listed in 5 U.S.C. §101. Moreover, in *Schreiber,* the Court did not consider whether the FCC rules would authorize disclosure otherwise prohibited by §1905; indeed, the party requesting confidential treatment did not even claim that the information fell within §1905. Nor did the Court consider that issue even implicitly in either *Norwegian Nitrogen Products* or *Isbrandtsen-Moller.* And, in *Schreiber,* the Court ruled only that the agency could disclose "assertedly" confidential documents as to which no evidence, but only a "naked assertion of possible competitive injury" (381 U.S. at 298), had been presented; indeed, the Court suggested that if it were shown that, as in this case, disclosure would cause competitive injury, the agency's authority to disclose would be circumscribed. *Id.* at 296.

[35] Pet. Br. 54-55 & n. 60; *see Weber v. Kaiser Aluminum & Chemical Corp.,* 563 F.2d 216 (5th Cir. 1977) (Executive Order 11246 cannot sanction what Congress, in §703(d) of Title VII of the Civil Rights Act, has prohibited).

the Secretary of Labor to delegate to OFCCP his authority "to promulgate rules and regulations of a general nature"; therefore, OFCCP's disclosure rules, which expressly purported to be "issued pursuant to the general rulemaking authority of the OFCC under Executive Order 11246" (38 Fed.Reg. 3193 (Feb. 2, 1973)), were invalid *ab initio.*[36]

IV. 18 U.S.C. § 1905 Is An Exempting Statute Within the Meaning Of FOIA Exemption 3

1. Because Petitioner believes that the Court will conclude that disclosure pursuant to agency regulations is not authorized by law under 18 U.S.C. § 1905, the question of whether § 1905 is an Exemption 3 statute is, contrary to Respondents' view (Resp. Br. 37 n. 21), of abiding importance and should be decided by the Court. Pet. Br. 55; Petition n. 33.

2. Amici CFA *et al.* argue that, "irrespective of the exact wording of Exemption 3" (Amici Br. 49), § 1905 can be applied through Exemption 3 to prohibit disclosure of confidential information *only* if the information is first found to be within FOIA Exemption 4. Amici's position is unsound in two respects. As Amici apparently concede, there is nothing in either the express language or the legislative history of Exemption 3 which reflects an intent to make the operation of 18 U.S.C. § 1905 or any other nondisclosure statute dependent upon the coverage of Exemption 4. *See Sears, Roebuck and Co.* v. *General*

[36] President Carter has recently amended §401 of Executive Order 11246 to remove this express limitation on the Secretary's power to delegate. See Executive Order 12086, 43 Fed. Reg. 46501 (Oct. 10, 1978). However, this amendment does not retroactively validate OFCCP's disclosure regulations, which were promulgated in 1973 in violation of §401's then-existing ban against delegation of authority to issue regulations of a general nature. *See Peters v. Hobby,* 349 U.S. 331, 346-47 (1955).

Services Administration, 553 F.2d 1378, 1384 (D.C. Cir. 1978).

Nor should such an intent be inferred from the mere fact that Exemption 4 applies to much of the same information whose disclosure is prohibited by 18 U.S.C. § 1905. As this Court has remarked, "the legislative history shows [that Congress] clearly did not undertake* * * to reassess every delegation of authority to withhold information which it had made before the passage of [the FOIA]." *FAA Administrator* v. *Robertson,* 422 U.S. at 265. Thus, in enacting FOIA Exemption 3, Congress simply did not consider the relationship between § 1905 and Exemption 4 and, therefore, cannot be deemed to have intended that § 1905 would apply only to information which is first found to fall within Exemption 4.[37]

3. All of these niceties aside, the basic fact is that since 1948, § 1905 has served as a bulwark against improper disclosure of trade secrets and confidential commercial information which are furnished by private persons to government agencies. In enacting the FOIA in 1966, Congress incorporated this and similar nondisclosure statutes into the Act by including Exemption 3. Pet. Br. 57. This was done not only to continue the longstanding protection of confidential business information which §1905 had afforded, but also to avoid the irreconcilably

[37] This is particularly true if Exemption 4 is to be narrowly construed under the standard articulated in *National Parks & Conservation Association v. Morton,* 498 F.2d 765 (D.C. Cir. 1974). See Pet. Br. 19 n. 19. For, some information whose disclosure is prohibited by the express terms of §1905 may not fall within the fourth exemption as construed in *National Parks.* If this narrow construction of Exemption 4 were permitted to restrict the applicability of §1905, that would amount to precisely the type of repeal by implication of a preexisting nondisclosure statute which Congress and this Court have stated was not intended in enacting the FOIA. Pet. Br. 52-53.

conflicting obligations of federal employees which otherwise would have arisen where the disclosure of business documents which did not fall within Exemption 4 was, on the one hand, required under the FOIA and yet, on the other hand, prohibited by § 1905. This result can be avoided, and the two statutes read in harmony, only by treating 18 U.S.C. § 1905 as an Exemption 3 statute.[38]

V. A Person Seeking To Enjoin Disclosure Of Trade Secrets Or Confidential Business Information Is Entitled To A Trial De Novo

Respondents do not contest that if, as Petitioner asserts, a right of action to enjoin disclosure can be implied under 18 U.S.C. § 1905 or FOIA Exemption 4, than a *de novo* trial should be held on the reverse FOIA plaintiff's claim of confidentiality. Pet. Br. 62-69; see Resp. Br. 56 n. 41. Instead, they argue that no private right of action can be implied under those statutes, that the reverse FOIA plaintiff's right of action arises only under the

[38] The contrary decision in *Crown Central Petroleum Corp. v. Kleppe,* 424 F. Supp. 744 (D. Md. 1976), is erroneous. In *Crown Central,* the district court relied upon a statement in a House Report on a *proposed* amendment to Exemption 3 which implied that 18 U.S.C. §1905 did not come within amended Exemption 3. But the amendment to Exemption 3 to which the House Report referred was quite different, in important respects, from the amendment finally adopted; indeed, subsection A of amended Exemption 3—which was included for the specific purpose of making clear that statutes which *mandate* confidentiality would come within the purview of amended Exemption 3 *even if* they did not include specific criteria by which to determine confidentiality (122 Cong. Rec. H7897 (daily ed. July 28, 1976) (remarks of Rep. Fascell))—was not added to the proposed legislation until *after* the House Report was issued and until *after* the bill had gone through a number of subsequent transformations. Pet. Br. 58-60. Consequently, the statement in the House Report, and any judicial decision based on it, are of questionable authority. *See* Note, *The Effect of the 1976 Amendment to Exemption 3 of the Freedom of Information Act,* 76 Colum.L.Rev. 1029, 1042 and nn. 76-78 (1976).

limited review provision of the APA, and that *de novo* review is not appropriate under 5 U.S.C. § 706(2)(F).

1. The most fundamental defect of Respondents' contentions is their denial of an implied right of action under 18 U.S.C. § 1905 and FOIA Exemption 4. As we showed in our opening brief (Pet. Br. 62-67), reverse FOIA plaintiffs such as Petitioner do in fact have an implied right of action to enjoin disclosure of documents which would contravene § 1905 and Exemption 4.[39] That right of action carries with it the right to a *de novo* trial.[40] Pet. Br. 67-69.

[39] Respondents' arguments against implication of a cause of action under §1905 and Exemption 4 are unpersuasive. Although §1905 will benefit the public (Resp. Br. 54), it is the owners of protected confidential business information for whose "*especial* benefit" the statute was enacted. *See Cort v. Ash,* 422 U.S. 66, 78 (1975). This, together with the fact that the criminal remedies provided by §1905 and the damages arguably available under the Tucker Act, 28 U.S.C. §1491, are incapable of restoring the confidentiality of data once disclosed and therefore powerless to repair the damage which disclosure would cause, makes "[t]he inference of a private right of action [to enjoin disclosure]. . . irresistible." *Texas & Pacific R. Co. v. Rigsby,* 241 U.S. 33, 40 (1961); *Cort v. Ash,* 422 U.S. at 79 n. 11.

Likewise, although the FOIA's express provision for an action to compel disclosure may suggest that Congress did not intend other means of enforcing the Act's *disclosure* provisions (Resp. Br. 34), that does not imply that Congress intended to restrict the means of enforcing the *nondisclosure* provisions of Exemption 4. *See Renegotiation Board v. Bannercraft Clothing Co.,* 415 U.S. 1, 20 (1973).

Finally, even if Exemption 4 or §1905, read separately, will not support a private right of action to enjoin agency disclosure of confidential business information, the two statutes *read together* will. *See National Association of Letter Carriers AFL-CIO v. Independent Postal System, Inc.,* 470 F.2d 265, 271 (10th Cir. 1972).

[40] The decisions of this Court cited at n. 88 of the brief of Amici CFA *et al.* are inapposite because those cases involved statutes where Congress had actually provided for "review" of *agency* decisions without indicating whether it was to be on the agency record or *de novo.* Here, in contrast, what is involved is a *de novo* determination of a right to the statutory protection afforded by Exemption 4 and 18 U.S.C. §1905, a decision involving no "review" of any agency action or discretion.

2. Even if no right of action can be implied under the nondisclosure statutes, a reverse FOIA plaintiff is still entitled to *de novo* review of its claims that the documents to be disclosed are exempt form mandatory disclosure because they fall within Exemption 4 and that disclosure of the documents is prohibited by 18 U.S.C. § 1905. For, in making those determinations, the trial court is not reviewing agency action or discretion; rather, it is independently determining the applicability of the nondisclosure statutes to the documents. Under these circumstances, there is no occasion, as Respondents suggest (Resp. Br. 57 & n. 42), to defer to agency expertise and no reason to rely on an agency record. Pet. Br. 69-71. This is true in large part even if, as Respondents argue (Resp. Br. 57), Exemption 4 is permissive in nature. Pet. Br. 72.

3. Respondents assert that the agency procedures employed in making disclosure decisions are not so inadequate as to render *de novo* review necessary under 5 U.S.C. § 706(2)(F). Resp. Br. 58. Yet, Congress has recently received testimony from federal agencies and commentators which uniformly states that the time period provided in the FOIA is not adequate to permit agencies to engage in the necessary factfinding and decision-making process to resolve cases involving disputed requests for disclosure of business information. Pet. Br. 74-76. That inability is not unique to this case but, rather, is systemic[41] and compels the conclusion that, regardless

[41] Remand to the agency for additional factfinding is not a sound or desirable remedy, as Respondents argue (Resp. Br. 59, 60). This is because, as experience in this case and others demonstrates, countless reverse FOIA cases will have to be remanded for further agency factfinding due to the inadequacy of the underlying administrative records. *See, e.g., General Dynamics Corp. v. Marshall,* 572 F.2d 1211 (8th Cir. 1978); and the decision below, Pet. App. A 39a-40a. Moreover, because the inadequacy of the agency record on which we

of whether Congress approves of the FOIA time limit, *de novo* review is necessary because of agencies' inability to engage in necessary factfinding.[42]

This time limit, moreover, renders companies resisting disclosure unable to submit to the agency the same type and amount of information in support of their claim of confidentiality which they would present to a court in a *de novo* action which was not subject to the FOIA's ten-day time limit.[43] Similarly, while courts may be no more

focus arises not from the agency's arbitrary disregard of objections to disclosure or its refusal to consider them (Resp. Br. 29, 60) but, rather, from the *inability* of the company to prepare the objections and the agency to meaningfully review them in the ten-day period, challenge of the agency's decision under the arbitrary and capricious standard would not be productive of a decision as to whether the documents are confidential and ought not to be disclosed. These factors undercut all of the traditional reasons for limiting court review to the agency record and suggest that the interests of fairness and economy would best be served by deciding reverse FOIA cases in a single *de novo* trial in the district court.

[42] The time consuming element in deciding whether to disclose assertedly confidential documents is the process of determining whether the information is exempt from mandatory disclosure because its release would cause substantial competitive injury, not whether the agency should as a matter of discretion disclose information which has been found to fall within Exemption 4. Consequently, the fact that the agency could take more time to make the latter determination because the FOIA "does not apply" to exempt materials (Resp. Br. 58-59) does not obviate the fundamental problem—that the agency does not have enough time to engage in adequate factfinding to determine, in the first place, whether the documents are exempt, a determination which must be made within the time limits prescribed in the FOIA.

[43] The assertion of Amici CFA *et al.* that "neither the burden of developing legal and factual arguments regarding alleged confidentiality, nor the level of sophistication or technical expertise needed to assess those documents is particularly substantial" (Amici Br. 64), betrays either a remarkable degree of unfamiliarity with the types of information which are at issue in cases such as this, or a callous insensitivity to the injury which disclosure of such information can cause. *See Sears, Roebuck & Co. v. General Services Adminis-*

expert than agencies[44] in determining the disclosability of assertedly confidential documents, courts, in contrast to agencies, have the time to gather sufficient facts to support a reasoned disclosure decision. In these circumstances, the denial of a *de novo* trial amounts to denial of effective review.[45]

Finally, recognition of the right to a *de novo* trial in reverse FOIA actions is not inconsistent with the objectives of the FOIA. First, while the Act is basically a disclosure statute, Congress' interest in preserving the confidentiality of business information is clearly expressed; and, where documents fall within Exemption 4, the beneficiaries of that exemption ought to be allowed to protect their interests in a *de novo* proceeding. Second, Congress' rationale in providing for a *de novo* action for one who has been denied access to government information—that, absent *de novo* review, the person will be unable to prove that the agency's action was improper "because he will not

tration, 553 F.2d at 1382, where the court of appeals recognized both the complexity of the factual questions presented by an action such as this, and the resulting need for a *de novo* evidentiary proceeding in which those issues could be adequately examined; *and Exxon Corp. v. FTC,* No. 76-0812 (D.C. Cir., Oct. 19, 1978), where the court recognized the need for a judicial hearing prior to public disclosure of a trade secret. Slip. Op. at 11.

[44] Contrary to Respondents' assertion (Resp. Br. 60), the agency officials who make FOIA decisions often are largely uninformed concerning the operations of the industry or company involved in the FOIA request. For example, the agency officials who decided to disclose Petitioner's documents were trained in EEO compliance activities. They had no particular knowledge concerning the automobile industry, Petitioner's operations, or the economic disciplines necessary to make a determination of the consequences of disclosure, and they sought no such advice.

[45] Even if *de novo* review were not warranted, receipt of *de novo* evidence to augment the administrative record would be warranted where no administrative hearing or adequate alternative has been afforded. *Krawez v. Stans,* 306 F. Supp. 1230, 1233-34 (E.D.N.Y. 1969).

know the reasons for the agency action"[46]—is equally applicable to the need for *de novo* review in an action to prevent the wrongful disclosure of private information; this is particularly true in a case such as the instant one where the agencies would not even allow Petitioner to examine some of the materials which they intended to disclose.[47] And third, *de novo* review in reverse FOIA cases will not delay the release of information which is ultimately determined to be disclosable; for, as explained in our opening brief, *de novo* trial in reverse FOIA cases will generally be no more time consuming than review on the basis of the agency record.[48]

[46] H.R. Rep. No. 1497 at 9.

[47] See Stipulation of Facts and Issues 11 (Sept. 29, 1975); Letter, A. William Rolf, Chrysler Corp., to John S. Crandell, DSA (July 3, 1975), Pl's. Ex. No. 39; Letter, Robert F. Bowers, Chrysler Corp., to Oscar A. Peay, DSA (May 23, 1975), Pl's. Ex. No. 40.

[48] Where, as here, agency action based on an inadequate agency record or inadequate factfinding procedures will deny a person of, or destroy, his property, the statute must be read as authorizing *de novo* factfinding in the district court to provide full procedural due process and to "preserve the regulatory scheme from constitutional attack." *Cross v. United States,* 512 F.2d 1212, 1217 (4th Cir. 1975).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

BURT A. BRAVERMAN
FRANCES CHETWYND
MARGARET ROLNICK
COLE, ZYLSTRA & RAYWID
2011 Eye Street, N.W.
Washington, D.C. 20006

A. WILLIAM ROLF
P.O. Box 1919
Detroit, Michigan 48288

Attorneys for Petitioner
Chrysler Corporation

October 30, 1978

Supreme Court, U. S.
FILED
JUN 2 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-922

CHRYSLER CORPORATION, *Petitioner*

v.

HAROLD BROWN, ET AL, *Respondent*

BRIEF AMICUS CURIAE OF THE ASSOCIATION FOR THE ADVANCEMENT OF INVENTION AND INNOVATION

EDWARD J. BRENNER, PRESIDENT
ASSOCIATION FOR THE
ADVANCEMENT OF INVENTION
AND INNOVATION
1911 Jefferson Davis Highway
Arlington, Virginia 22202

By: PAUL L. GOMORY
EDWARD J. BRENNER
Attorneys

PAUL L. GOMORY
1825 K Street, N.W.
Washington, D.C. 20006

CONTENTS

	Page
THE AMICUS	1
INTEREST OF AMICUS	2
THE DECISION BELOW CONTRIBUTES TO AN UNFAVORABLE CLIMATE FOR INVENTION AND INNOVATION IN THE UNITED STATES	2
1. Public Policy Supports Providing Incentives for Invention and Innovation	2
2. The "Missing Link" to an Invention or Innovation May Reside in Submitted Confidential Information	4
3. Need for De Novo Review of Agency Action	8
(a) No Compensation provided for in act.	9
4. Small Business—Larger Business	10
5. Anti-trust Laws	11
SUMMARY	12
CONCLUSION	12

TABLE OF AUTHORITIES

	Page
CASES:	
EPA v. *Mink*, 410 U.S. 73, 80 (1973).	9
Kewanee Oil Co. v. *Bicron Corp.*, 416 U.S. 470 (1974)	6
Sears v. *Gottschalk*, 434 U.S. 965 (1977) denying cert.	6
Westinghouse Electric Corp. v. *Schlesinger*, 542 F.2d 1190 (4th Cir. 1976), *cert. denied sub mon. Brown* v. *Westinghouse Electric Corp.* _____ U.S. _____ (1977).	5
TEXT:	
Federalist Paper No. 43 by James Madison	3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-922

CHRYSLER CORPORATION, *Petitioner,*

v.

HAROLD BROWN, ET AL., *Respondents.*

BRIEF AMICUS CURIAE OF THE ASSOCIATION FOR THE ADVANCEMENT OF INVENTION AND INNOVATION

I

THE AMICUS

The Association for the Advancement of Invention and Innovation ("A^2I^2") is a nonprofit professional association of inventors, entrepreneurs, research directors, businessmen, scientists, engineers, lawyers, patent attorneys, educators, former government officials and others who are dedicated to the proposition of improving the climate for invention and innovation in our country. The combined background of the membership embraces the entire spectrum of the process of invention (conceiving the

idea) and innovation (bringing the invention to the marketplace.)

II

INTEREST OF AMICUS

The Association seeks to foster a continually improving appropriate climate for invention and innovation in our country. A time-recognized basic or essential condition for invention and innovation is incentive to invest the time, money and effort to make inventions and innovations. In the view of A^2I^2 the present case raises issues which have a major impact on the process of invention and innovation in this country.

III

THE DECISION BELOW CONTRIBUTES TO AN UNFAVORABLE CLIMATE FOR INVENTION AND INNOVATION IN THE UNITED STATES

1. Public Policy Supports Providing Incentives For Invention and Innovation

We appear in this case because of our primary concern that invention and innovation are basically important to our country's continued health, economic welfare and military preparedness and that the decision below, if sustained, will derogate from a climate which fosters invention and innovation and our country's technological advancement.

The same knowledge and components basic to a vigorous, progressive society, economically speaking, are at the core of our defense.

The continued welfare of our people, jobs, health and pursuit of happiness have been and are dependent upon invention and innovation. This was and still stands recognized in the constitutional mandate of Article I, Section 8, Clause 8 wherein, in empowering the Congress to "promote" the progress of the useful arts, the founding fathers recognized the need to provide for exclusivity and protection of progress-promoting creative efforts. The Congress in exercise of its power in Article I, Section 8, Clause 8 enacted our patent laws. Only in one other place in the document does the word "promote" appear, to wit in its Preamble, wherein it is impliedly distinguished from the word "provide". It was the intent of the founding fathers to induce advances by promoting efforts to invent and to innovate.[1]

In implementing this constitutional mandate, Congress has consistently adhered to the principle that it must provide for, and protect, the exclusivity of intellectual property. This is to foster a suitable climate in which persons will have the incentive to invest their time, funds and effort to promote the progress of "the useful arts." The Nation's Patent System, its copyright and trade secrets laws are founded upon this principle.

In enacting the Freedom of Information Act, 5 U.S.C. §552, Congress had in mind continued adherence to this well tested means of stimulating expansion of our scientific, technical and commercial know-how. "Exemption 4" of the FOIA, 5 U.S.C. §552(b) (4) was enacted to ensure that trade secrets and commercial information which are confidential in

---

[1] Federalist Paper No. 43 by James Madison.

nature and which, for one reason or another, are furnished by a private person or organization to the Government would not be subject to disclosure under the general mandate of the Act.

Today, however, all kinds of information are being sought and obtained from the Government under the FOIA including data which have been acquired by the Government which concern trade secrets, proprietary information and inventions. While some courts have correctly applied the fourth exemption to protect such data from improper disclosure, others, such as the court below, have interpreted the Act in such a way as to pose a substantial threat to the exclusivity of progress-promoting trade secrets, inventions and their innovation.

A²I² believes that invention and innovation are tremendously important to our country's continued health, economic welfare and military preparedness. In our view, the decision of the court below would result in inadequate promotion and protection of invention and innovation, and would retard rather than "promote the progress of the useful arts". This would be inconsistent not only with the legislative intent underlying the FOIA but, even more fundamentally, with the intent of Article I, Section 8, Clause 8 of the Constitution as expressed in Federalist Paper No. 43.

2. The "Missing Link" To An Invention May Reside In Submitted Confidential Information

There are many stages involved in the conception, refinement and ultimate commercial application of an invention, including research, development and manufacture. Each of these stages requires and in turn

generates a broad spectrum of data relating not only to technical matters but also to such areas as the hiring and assignment of personnel, their qualifications and fields of expertise, the objectives of the program, the design and building of equipment to be utilized, the materials to be employed, the processes to be applied, etc. A substantial portion of the invention and innovation in this Nation occurs in a competitive climate in which one person or company will be seeking to develop the same, or better, process, idea or equipment as another, at the same or an earlier time.

Often, the key to a successful commercialization effort may lie in what superficially appears to be an insignificant or obscure piece of information. Such bits and fragments of information often have proved to be the "missing link" between conception and successful development or marketing of an idea. Businesses (and individuals) as a matter of ordinary practice seek to obtain and analyze all of the information which they can acquire concerning related plans and activities of their competitors.[2] This kind of information can very materially aid a competitor to piece together the existence, nature, and objectives of a project which may heavily involve inventions and innovations

In the past, such information gathering activities were limited by virtue of the absence of sources of information, or were conducted surreptitiously through various types of "industrial espionage." At present, however, such surveillance often takes the

---

[2] See Westinghouse Electric Corp. v. Schlesinger, 542 F.2d 1190 (4th Cir. 1976), cert. denied sub nom. Brown v. Westinghouse Electric Corp., _____ U.S. _____ (1977).

form of requests for disclosure of confidential data under the Freedom of Information Act. Regardless of the method, any time that A is able to learn the nature of B's trade secret or confidential information, without either compensating or obtaining consent from B, the result is bound to be inherently harmful to B, anticompetitive, and contrary to the public interest.

This Court has recognized the public interest in preserving the exclusivity and confidentiality of the kinds of information utilized in invention (research) and innovation (development).[3] Yet, notwithstanding the Court's decision in *Kawanee*, decisions such as that of the court below threaten to allow the public disclosure of information which is equally deserving of protection as the type of information which the Court held secure in *Kewanee*. The result of such release could be just as damaging to the interest of a company, and therefore to the long-term public interest, as the infringement of rights which the Court condemned in that case.

Disclosure of confidential commercial information, and the adverse effects which release will often cause, is certain to constitute a disincentive to future efforts to invent and to innovate and to competition in so doing. For, as we observed previously, the proper climate must exist if people and businesses are to be willing to invest their time, resources and effort in the creative process of invention and innovation; and an essential ingredient of that climate is protection

[3] See Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470 (1970); Sears v. Gottschalk, _____ U.S. _____, 186 USPQ 161, denying cert. 183 USPQ 13. A²I² appeared as *amicus curiae* in these cases.

from what in effect would constitute arbitrary confiscation of intellectual property under the FOIA. The decision of the court below allows the disclosure of such information against the will of its creator, without any compensation, and without due procedural safeguards. It is therefore contrary to the mandate of Article I, Section 8, Clause 8 that Congress *promote* the useful arts, to make such release.

In the present case our interest is to persuade the Court to preserve the confidentiality of business information which can provide the missing link[4] in the effort of a person or organization to discover his competitor's plans, including his inventions and innovation operations.[5]

We have studied the FOIA, its legislative history and the cases which have been decided concerned with Exemption 4. In our view the FOIA was enacted to provide the citizen with information about his government. It was not enacted to provide avenues along which to take intellectual property and thus to circumvent the trade-secret and patent laws.

It is our view that the nature of confidential information required of or voluntarily submitted by a person or organization to the Government, which ordinarily would be kept secret by that person or organization, defines it as being the kind of information which the Congress did not intend to make subject to disclosure when it enacted the FOIA and the Act's fourth exemption.

[4] Westinghouse Electric Corp. v. Schlesinger, Supra.

[5] Our interest is a collateral one as to whether the specific nature of the information sought in the present case is the kind of information which should be released under FOIA or should be included within its confidentiality exemption.

Furthermore, whether information is released by the Government to others should depend *solely* upon whether it is business information (which may be the earlier-mentioned "missing link") and whether the submitter has treated it as confidential in the sense that it is part and parcel of his competitive stock-in-trade which ordinarily he would not release to just anyone. For, as we perceive it, the congressional intent underlying Exemption 4 is that the importance of maintaining confidentiality for business information which has been submitted to the Government outweighs that of disclosure of that information under FOIA, *especially in the absence of a provision in the Act for compensation for such disclosure.*

3. Need For De Novo Review Of Agency Action

As noted above, information which is superficially harmless may be, in fact, potentially greatly significant as a "missing link"—this underscores the undesirability of having the agency determine what is and what is not to be accorded confidentiality. Government agency personnel, because of their lack of expertise and business knowledge concerning the information to be disclosed, how it could be used, or what it might reveal, are not equipped to judge whether confidentiality of the information should be preserved. Moreover, the agency cannot really overcome reasonably the FOIA time limit imposed upon it. Consequently, agency decision-making must be subject to *de novo* court review if the property and related rights of submitters are to be adequately safeguarded.

In this context, delegation to the agencies of the discretion to disclose confidential information will frustrate the congressional intent underlying Exemption 4—which is, that the public interest in disclosure of information concerning the activities of its Government, however strong, does not warrant or require the disclosure of private business information which has been supplied to the government by private persons or organizations.

The inclusion of Exemption 4 in the FOIA reflects the balance of formula[6] intended by Congress, and this intent should be followed. The review, if any, of whether information sought to be released is confidential (and for this reason falls within the fourth exemption of the Act) should be limited to determining whether the submitter has in good faith termed or labeled it confidential or to be within the words of the FOIA exemption. Congress recognized that such intellectual property needed protection.

3.(a) No compensation provided for in act

No provision or procedure for compensation for taking such property was provided because Congress did not intend it to be taken. If the agency is to be given the power to release the information despite the contrary wish of the submitter, the issue should be determined ultimately by a court *de novo* following a required sufficient notice to the submitter of the intended release.

Each of these factors underscores the compelling need for *de novo* review of agency decisions to disclose confidential commercial information. Because of agencies' general lack of pertinent business expertise, because of the time constraints imposed upon agencies which prevent development of an

[6] EPA v. Mink, 410 U.S. 73, 80 (1973).

adequate agency record, and because of the due process implications of a decision to disclose confidential intellectual property, only a *de novo* hearing in the district court can adequately safeguard the important interests of the owners of such property, and of the Nation, in having Exemption 4 construed consistently with the original intent of Congress.

4. Small Business – Larger Business

The manner in which the Court decides this case will be particularly crucial to small businesses. The ability of such businesses to survive, compete and grow is often dependent upon the extent to which they innovate. Should those businesses be forced to operate as an open book, it would often become substantially more difficult for them to survive, let alone grow, in a market inhabited by other companies having far greater resources.

Small business needs protection for all kinds of information, which may in any manner be related as a missing fragment to its investments of time, funds and efforts to invent and to innovate. Presently, small business is creating a very substantial portion of invention and innovation.

All businesses start small. There are now hundreds of thousands of small businesses. Exclusivity or confidentiality of their information is critical to their well-being and continued existence and growth. After all, America's business is business.

An essentially agricultural community of small states became the great industrial and military power

we are—based very largely on the exclusivity and intellectual property protection accorded by the Congress and the States under our patent and trade secret laws which are time-honored and time-tested.

Also, larger firms which also heavily invest in R and D ventures would be prejudiced by disclosure of their confidential information.

5. Anti-Trust Laws

The disclosure or exchange of confidential information by one person or organization to another by way of FOIA request, however, unintentionally effected, can result indirectly in that which is now prohibited under our antitrust laws. Also, market concentration could be increased without any overt cooperation.[7] Further, this could affect seriously a small business seeking to survive among other businesses.

Finally, no business, large or small, can really afford to wage reverse FOIA suits, the cost of which the consumer must pay in the end.

The Court's decision should take into account the importance to our people of the factors discussed above.

---

[7] The real party in interest need not be identified in an FOIA request.

SUMMARY

In summary, then, we urge the Court to decide that

1. The FOIA means what it states respecting confidential or secret information submitted as such.

2. The FOIA was enacted simply to protect people's right to know what their government is doing, and to obtain information about its activities, policies and procedures.

3. The submitter should be the person to decide in the first instance whether his information is to be released; his decision may, of course, be subject to judicial review.

4. Due process requires notification to the submitter of intended release and that responsive to that notification he should have a full, *de novo* opportunity to prevent the requested release.

5. Confidentiality of information related in any manner to the incentive to invest time, funds and effort in invention and innovation shall be preserved, this being in the long-term, enlightened self-interest of the public in the continued creation and growth of businesses.

CONCLUSION

The Freedom of Information Act was enacted to enable the public to learn more about how its Government was operating. The Act was not intended to countenance the disclosure of the details of a particular company's operations.

The decision of the court below departs from the congressional intent by (1) allowing disclosure of information deemed confidential by the submitter without his consent, and (2) curtailing the right of the owners of such information to obtain full and meaningful judicial review.

In both respects, the court of appeals' decision will discourage invention and innovation and will, therefore, deprive the public of the fruits of such efforts.

For these reasons, A^2I^2 urges the Court to reverse the decision of the court of appeals.

EDWARD J. BRENNER, PRESIDENT
ASSOCIATION FOR THE ADVANCEMENT OF INVENTION AND INNOVATION
1911 Jefferson Davis Highway
Arlington, Virginia 22202

By: PAUL L. GOMORY
EDWARD J. BRENNER
Attorneys

PAUL L. GOMORY
1825 K Street, N.W.
Washington, D.C. 20006

FILED
JUN 8 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-922

CHRYSLER CORPORATION,
Petitioner,

vs.

JAMES A. SCHLESINGER,
Secretary United States Department of Defense, et al.,
Respondent.

BRIEF AMICUS CURIAE ON BEHALF OF THE NATIONAL SECURITY INDUSTRIAL ASSOCIATION

RICHMOND C. COBURN
THOMAS E. DOUGLASS
One Mercantile Center
Suite 2900
St. Louis, Missouri 63101
Attorneys for Amicus Curiae
The National Security Industrial
Association

Of Counsel:
COBURN, CROFT, SHEPHERD, HERZOG & PUTZELL
One Mercantile Center
Suite 2900
St. Louis, Missouri 63101
LEGAL AND SPECIAL TASKS SUBCOMMITTEE
NATIONAL SECURITY INDUSTRIAL ASSOCIATION
Union First Bank Building
Suite 700
740 15th Street N. W.
Washington, D. C. 20005

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

INDEX

	Page
Interest of Amicus	1
The Type of Information Submitted to Federal Agencies in the Procurement Process	3
The Decision to Disclose Confidential Business Information Protected by Exemption 4 of the FOIA and 18 U.S.C. § 1905 Should Not Be Left to the Discretion of an Agency	7
De Novo Review of a Claim of Confidentiality Is Necessary and Was Intended by Congress	11

TABLE OF AUTHORITIES

Cases

Babcock & Wilcox Co. v. Rumsfeld, 70 F.R.D. 595 (N.D. Ohio 1976)	6
Burroughs Corporation v. Schlesinger, 403 F.Supp. 633 (E.D. Va. 1975)	6
Charles River Park "A", Inc. v. HUD, 519 F.2d 935 (D.C. Cir. 1975)	10, 11
General Dynamics v. Brown, No. 77-0905c(2) (E.D. Mo. Aug. 18, 1977)	6
Honeywell Information Systems, Inc. v. NASA, No. 76-353 (D.D.C. July 28, 1976)	6

Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470 (1974) .. 8
Kleinschmidt Division, SCM, Armed Services Board of Contract Appeals No. 21022 (April 24, 1978) 4
Leeds & Northrup Co. v. Energy Research and Development Administration, No. 77-1047 (D.D.C. June 16, 1977) 7
Sears, Roebuck and Co. v. GSA, 553 F.2d 1378 (D.C. Cir. 1977) 11
Shermer Industries, Inc. v. Secretary of United States Air Force, No. 77-1495-F (N.D. Tex. May 2, 1978) 7
USS-OCF-W&M v. Eckerd, No. 76-1933 (D.D.C. December 9, 1976) 6, 8
Westinghouse Electric Corp. v. Schlesinger, 542 F.2d 1190 (4th Cir. 1976), cert. denied, 97 S. Ct. 2199 (1977) ..10, 11

Statutes

5 U.S.C. § 552 2
5 U.S.C. § 552(a)(4)(B) 11
5 U.S.C. § 552 (a)(6)(A)(i) 12
18 U.S.C. § 1905 .....2, 5, 7, 8, 10, 11

Miscellaneous

S. Rep. No. 813, 89th Cong., 1st Sess. (1965) 9
H.R. Rep. No. 1497, 89th Cong, 1st Sess. (1966) 9
Hearings of S. 1666 Before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 88th Cong., 1st Sess. (1964) 9
Note, A Review of the Fourth Exemption of the Freedom of Information Act, 9 Akron L. Rev. 673 (1976) 10

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-922

CHRYSLER CORPORATION,
Petitioner,

vs.

JAMES A. SCHLESINGER,
Secretary United States Department of Defense, et al.,
Respondent.

BRIEF AMICUS CURIAE ON BEHALF OF THE NATIONAL SECURITY INDUSTRIAL ASSOCIATION

The National Security Industrial Association respectfully submits this brief Amicus Curiae. All of the parties to the cause, through their counsel, have consented to this filing; their written consents have been filed with the Clerk pursuant to Rule 42.

INTEREST OF AMICUS

The National Security Industrial Association ("NSIA") is a non-profit association of approximately two hundred and fifty American industrial and research companies of all sizes which

provide products and services to the United States Government. The association's essential purpose is to foster an effective working relationship between government and industry in the interest of national security. It regularly provides advice and technical assistance to the government.

The present case is of substantial concern to the members of the association. Virtually all of them regularly submit proprietary information to federal agencies which may be subject to disclosure under the Freedom of Information Act ("FOIA"), 5 U.S.C. §552. Of particular concern to NSIA is disclosure of information submitted in connection with the government's procurement of goods and services. Each member regularly submits, for example, bid proposals which contain, among other things, advanced technology descriptions and detailed cost and pricing data. The protections given such proprietary data by Exemption 4 of the FOIA and 18 U.S.C. §1905 have been greatly reduced if not eliminated by the Third Circuit's opinion. Contrary to that opinion these protections are essential to protect proprietary data from disclosure to foreign and domestic competition.

The association is also concerned that a judicial determination which precludes adequate protection of confidential data will impair the government's ability to collect sufficient information in the future. Much of that information is voluntarily submitted, in confidence, to aid the government in meeting its procurement goals. A free and regular exchange of information is not only essential to fulfilling procurement goals but is also only possible in a confidential environment.

THE TYPE OF INFORMATION SUBMITTED TO FEDERAL AGENCIES IN THE PROCUREMENT PROCESS

The decision of the Third Circuit Court of Appeals in *Chrysler v. Schlesinger* threatens the defense industry with unprecedented disclosure of trade secrets. The seriousness of the problem is demonstrated by a brief review of the type of information submitted to the government by the industry.

When the government seeks to procure a complex good or service, it issues a request for a proposal. The government's request can be and often is nothing more than a performance specification of a goal it wishes achieved, *e.g.*, production of a missile that can reach a targeted site at a certain speed and with a specified accuracy. The usual proposal submitted in response is a lengthy and detailed description of how the defense contractor will accomplish the envisioned task. A contractor's proposal would, for example, normally contain, *inter alia*: (1) detailed operational designs, (2) a description of performance characteristics, (3) the names, functions and qualifications of management and personnel who will be performing the contract, (4) a thorough description of facilities and production capabilities, (5) production specifications and techniques (including historical and projected standard hours for various production operations), (6) results of development tests, (7) quality control techniques, and (8) overall and itemized costs. A competitor describes in detail in its proposal its unique capabilities in an attempt to convince the government to select it as the contractor.

In *Planning Research Corp. v. FPC*, 555 F.2d 970 (D.C. Cir. 1975) a proposal (for a computer based regulatory information system) was summarized as follows:

> [The proposal] represents the ultimate summation of PRC's methodology, in terms of corporate strategy, man-

agement techniques, and state-of-the-art technology, for entry into a new business area. It discloses in detail the company's techniques for informational system analysis, design, and verification, system implementation, facility planning, operation and maintenance, and project management procedures. * * * It describes in great detail the company's unique corporate approach to planning and executing large-scale projects, including specific blueprints for the company's every step in planning, installing, and operating a sophisticated computer facility. It offers innovative options, not solicited by the Request for Proposals, for dynamic system modeling and alternatives to the plan embodied in the Request for Proposals. It provides costing information in complete detail, the disclosure of which would enable any competitor to predict the company's pricing schedules with alarming accuracy in any bidding procedures. In short, it sets forth all of the company's trade and marketing secrets, developed over more than 20 years of experience at great expense, the disclosure of which to competitors would provide those competitors with a direct source of materials for their own proposals now being developed for the installation of similar computer systems in other agencies. 555 F.2d at 972.

A substantial amount of documentary information about a defense contractor is also generated subsequent to a contract award and during the production phase. Some of that information includes regular cost reports, contract funds status reports, regular production progress reports, Defense Contract Audit Agency audits,[1] and quality deficiency reports. This kind of information reveals (a) *manpower data* (learning curves, productivity, forecasts and projections of future workloads, and man hours incurred to accomplish a specified task); (b) *material data* (shortages, competitive vendor quotes, procurement costs, and lead times); (c) *cost data* (incurred costs, estimated costs at completion, productivity trends, program performance, direct costs, material and overhead costs and estimating and pricing practices together with future projections of everything from likely new business to later union settlements); and (d) *performance data* (delivery dates, production sequencing, master construction schedules, and efficiency).

[1] In addition, government contractors are subject to government auditors inspecting, auditing, and copying documents relating to performance under the contract. See, *Kleinschmidt Division, SCM*, Armed Services Board of Contract Appeals No. 21022 (April 24, 1978).

It would appear on its face that this information is trade secret and commercial information which could be of substantial use to competitors and should not be disclosed by federal agencies pursuant to Exemption 4 of the FOIA and 18 U.S.C. § 1905. The painful experience of many of the members of NSIA, however, has been that the agencies have disclosed such information to domestic and foreign competitors, at times even without notifying the submitter.

The experience of two of NSIA's members, while unreported but carefully verified by counsel, illustrates for the Court the serious problem of loss of American technology to foreign competition. General Dynamics was awarded a contract by the United States government to develop and produce large ocean data buoys and in connection therewith had submitted a production data package to the United States Coast Guard. In 1974, General Dynamics submitted a proposal to the Canadian government to manufacture ocean buoys and shore stations. Unbeknownst to General Dynamics, a Canadian company obtained, through the Freedom of Information Act, the production data package from the Coast Guard and utilized this information to successfully underbid General Dynamics on the sale of the ocean buoys to the Canadian government. In 1973, Dow Chemical Company was involved in negotiations with a Japanese firm for the sale of a Dow chemical process to the foreign firm.

During the negotiations, Dow and two other American manufacturers were required by a federal agency to submit, for environmental studies, certain information about the process to the agency. A short while later, the Japanese firm indicated to Dow that they were no longer interested in the process. Upon investigating the matter with the agency, Dow learned that the foreign firm had obtained from the agency, under the Freedom of Information Act, copies of the information submitted by Dow and the two American firms. Dow thereby lost the opportunity to sell its technical know-how.

There are numerous reported instances in which the contractor has been confronted with an agency's willingness to disclose bid proposal information to domestic competition. In *USS-OCF-W&M v. Eckerd*, No. 76-1933 (D.D.C., December 9, 1976), the requester sought and the agency was willing to disclose data and engineering drawings for building components contained in a successful government contract proposal. In *Babcock & Wilcox Co. v. Rumsfeld*, 70 F.R.D. 595 (N.D. Ohio 1976) the agency had indicated that it would disclose costs, prices, profits and cash flow provisions in a sub-contract under a government contract for nuclear powered propulsion systems. In *General Dynamics v. Brown*, No. 77-0905C(2) (E.D. Mo. Aug. 18, 1977) *(cause dismissed October 19, 1977 when FOIA request withdrawn)*, an agency determined that technical and cost data in a successful bid proposal on the first of our different versions of the cruise missile was disclosable. In *Burroughs Corporation v. Schlesinger*, 403 F. Supp. 633 (E.D. Va. 1975), the information deemed disclosable by the agency was prices and discounts for components for a computer data processing system contained in an unsuccessful proposal for a government contract. Similarly in other cases, agencies have indicated that they would release technical and cost data in other computer system proposals. See *Planning Research Corp. v. FPC, supra*, 555 F. 2d at 971; *Honeywell Information Systems, Inc. v. NASA*, No. 76-353 (D.D.C. July

28, 1976), appeal dismissed No. 76-1977 (D.C. Cir. May 6, 1977); *Leeds and Northrup Company v. Energy Research and Development Administration*, No. 77-1047 (D.D.C. June 16, 1977) *(cause dismissed on July 11, 1977 under stipulation not to disclose)*.

A recent direct FOIA opinion further demonstrates the aggressiveness of competitors and the valid basis for concern that loss of competitive information in proposals does occur, even with judicial approval. In *Shermer Industries Inc. v. Secretary of United States Air Force*, No. 77-1495-F (N.D. Tex. May 2, 1978) the requester sought the cost proposals of three competitors for overhauling airborne generators, even though the contract was partially in the pre-award stage. The Court ordered release of the information upon the questionable finding that the information was not within 18 U.S.C. §1905 and was not protected by Exemption 4 of FOIA because that section must be read "narrowly".

THE DECISION TO DISCLOSE CONFIDENTIAL BUSINESS INFORMATION PROTECTED BY EXEMPTION 4 OF THE FOIA AND 18 U.S.C. §1905 SHOULD NOT BE LEFT TO THE DISCRETION OF AN AGENCY

If Exemption 4 of the FOIA is permissive and if federal agencies have the discretionary power to release exempt documents, as the Third Circuit holds, the protections afforded confidential commercial information by Congress have been all but eliminated. If left to stand the Third Circuit's decision would reduce Exemption 4 and 18 U.S.C. §1905 to ineffectual admonitions. The decision is contrary to public policy and legislative history and fails to recognize the critical distinction between government and private information.

Businesses have always maintained their records in confidence. The reason for secrecy is founded in the concern that such in-

formation might be helpful to a competitor and in the desire to conduct business affairs in private. This Court in *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470 (1974), affirmed the importance of protection of confidential business data such as trade secrets:

> The maintenance of standards of commercial ethics and the encouragement of invention are the broadly stated policies behind trade secret law. 'The necessity of good faith and honest fair dealing is the very life and spirit of the commercial world.' . . . In *A. O. Smith Corp. v. Petroleum Iron Works Co.*, 73 F. 2d at 539 [6th Cir. 1934], the court emphasized 'that even though a discovery may not be patentable, that that does not destroy the value of the discovery to one who by unfair means, or as the beneficiary of a broken faith, obtains the desired knowledge without himself paying the price in labor, money, or machines expended by the discoverer.' 416 U.S. at 481-2.

The above expressed public policy, which prevents unfair competitive use of confidential commercial information, is embodied in various provisions of federal law. Exemption 4 of the FOIA, the federal criminal code prohibition against disclosure of business secrets (18 U.S.C. §1905), and the federal procurement regulations proscribe disclosure of trade secrets and proprietary business data. "These provisions recognize and provide for the non-disclosure of confidential business information compiled through an owner's efforts, skills, and resources, and thus, there is [a] public interest in favor of judicial protection of such data". *USS-OCF-W&M v. Eckerd, supra,* No. 76-1933, slip. op. at 5.

The legislative history of Exemption 4 confirms these public interest concerns. Both the House and Senate Reports on the FOIA bills provide that the exemption is intended to protect information which *customarily* would not be released to the public by the person from whom it was obtained. It seems clear

that in enacting Exemption 4 Congress specifically sought to protect business information which industry *customarily* held in confidence and expressly exempted such information from mandatory disclosure.

The Senate Report, citing examples of the types of information which "customarily would not be made public", provides that this category would include business sales statistics, inventories, customer lists, manufacturing processes, and "any commercial, technical, and financial data" submitted to a lending agency in connection with a loan.[2] The House Report also specifies that the exemption would include business sales statistics, inventories, customer lists, scientific or manufacturing processes or developments, and negotiation positions or requirements in labor-management mediations.[3] The congressional reports provide that these broad categories of materials are to be exempt from disclosure *per se*, without any inquiry into whether their release in whole or in part would result in competitive injury. The legislative history of FOIA, then, suggests the adoption of the public policy of protecting business information submitted by private parties. As stated in hearings on the FOIA bill: "We can see no reason for changing the ground rules of American business so that any person can force the Government to reveal information which relates to the business activities of his competitor.[4]

FOIA's legislative history also seems to make clear that the only intent and purpose of the Act was to make available to the public information concerning records and actions of the various underlying governmental agencies. It was *not* intended to make public reports, plans and data confidentially submitted

---

[2] S. Rep. No. 813, 89th Cong., 1st. Sess. 9 (1965).

[3] H.R. Rep. No. 1497, 89th Cong., 1st. Sess. (1966).

[4] Hearings of S.1666 Before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 88th Cong., 1st. Sess. 174 (1964) (Treasury Department Witness).

to the government by underlying private parties. As stated by one commentator,[5] and as cited with approval in *Westinghouse Elec. Corp. v. Schlesinger*, 542 F2d 1190, 1210 (4th. Cir. 1976):

> The purpose of the Freedom of Information Act was to protect the people's right to obtain information about their government, to know what their government is doing, and to obtain information about government activities and policies. The Freedom of Information Act was not enacted for the purpose of enabling the public to obtain information about individuals and corporations, about what those individuals and corporations are doing, or about what their activities and policies are.

It would seem fundamental that private information and private documents do not lose their private character merely because such documents have been submitted to a governmental agency either pursuant to a mandatory filing requirement or voluntarily in an effort to comply with a regulatory program, to cooperate with a government fact finding agency, or to aid the government in the process of obtaining its procurement goals. A private document should remain private even though information taken therefrom may be used confidentially by government for its own purposes.

The Third Circuit's opinion has failed to give recognition or meaning to the intent and purposes of FOIA Exemption 4 and 18 U.S.C. § 1905. It was this seemingly clear intent to protect business data that led the Fourth Circuit, in *Westinghouse Electric Corporation v. Schlesinger*, 542 F.2d 1190 (4th Cir. 1976), *cert. denied sub nom. Brown v. Westinghouse Electric Corp.*, 97 S. Ct. 2199 (1977), to find that Exemption 4 was mandatory, and the D. C. Circuit, in *Charles River Park "A", Inc. v.*

[5] Note, A Review of the Fourth Exemption of the Freedom of Information Act, 9 Akron L. Rev. 673, 694 (1976) (footnote omitted.)

HUD, 519 F.2d 935 (D.C.Cir. 1975), to find that agency disclosure in violation of § 1905 would, in and of itself, be an arbitrary and capricious act. In finding Exemption 4 permissive and in finding 18 U.S.C. § 1905 inapplicable, and in further finding that a disclosure decision as to business data should be left to the discretion of an agency, and in denying effective judicial review of that decision, the Third Circuit has all but eliminated the ability of the owner of business data to protect it from disclosure.

DE NOVO REVIEW OF A CLAIM OF CONFIDENTIALITY IS NECESSARY AND WAS INTENDED BY CONGRESS

Prior to *Chrysler*, the Fourth and the District of Columbia Circuits had ruled that a judicial determination as to whether business records were within FOIA Exemption 4 was to be made *de novo*.[6] The determination was to be made *de novo* regardless of whether the issue was raised by a requester in a FOIA action to compel disclosure of the records, or by a company seeking to prevent disclosure in a reverse FOIA action.[7]

In the instant case the District Court held an evidentiary hearing in which Chrysler was permitted to prove the confidential nature of the data in issue. On the basis of Chrysler's proof, the District Court issued detailed findings of fact and concluded that Chrysler could be harmed competitively by disclosure of portions of the data. The Third Circuit reversed. It held that Chrysler was not entitled to *de novo* review, that the District Court was confined, under an APA standard, to review of the

[6] See *Westinghouse Elec. Corp. v. Schlesinger, supra*, 542 F.2d at 1214-15; *Sears, Roebuck and Co. v. GSA*, 553 F2d 1378, 1381 (D.C.Cir. 1977); *Charles River Park "A", Inc. v. HUD, supra*, 519 F.2d. at 940 n. 4. FOIA affords a requester seeking to compel disclosure *de novo* review. 5 U.S.C. §552(a)(4)(B).

[7] *Id.*

administrative record, and that the agency action could only be set aside upon a showing that that action was arbitrary and capricious.

This holding would perhaps not seem so startling if the submitter had the opportunity to present its case to the agency and thereby develop a record sufficient for judicial review. The fact is, however, that the submitter of information is given, in most instances, no opportunity to make even a cursory showing at the agency level. The FOIA and the agencies' procedures implementing the statutory mandate of the FOIA preclude that opportunity.

First neither the FOIA nor most agency regulations require that notice be provided to submitters. Second even when notice is provided gratuitously, disclosure decisions must under the FOIA be made in only ten days. *See* 5 U.S.C. § 552 (a)(6)(A)(i). Finally neither FOIA nor agency regulations require agencies to extend the ten day limit, to provide the submitter with a hearing, or to make findings in support of a decision to disclose. Not only do these facts do violence to fundamental concepts of due process but they also render impossible any meaningful judicial review of the often skimpy or non-existent "administrative record".

The cornerstone, then, of the Third Circuit's decision, adequate agency consideration, is a fiction, which rests on the Third Circuit's misconstruing the FOIA and Congressional intent. Congress did not intend to preclude *de novo* review of a submitter's claim that trade secret and confidential information is exempt from disclosure under the FOIA. If Congress had had that intent it would not have compelled agency disclosure decisions within ten days thereby making adequate agency review and development of an agency record next to impossible.

It has been the experience of the members of NSIA that the only opportunity given them to make their record is in the

form of a letter to the agency. That letter is hurriedly submitted within ten days, is necessarily general and conclusory, and is usually based on inadequate study of the often voluminous documents requested. The practical consequences of the Third Circuit's holding is that this brief letter is the only opportunity a submitter will ever be given, either in an agency or in court, to substantiate its claim of confidentiality. Congress could not have intended such a result.

To the members of NSIA this result is nothing short of absurd. As discussed above, the defense industry submits, *inter alia*, multi-volume bid proposals to federal agencies. The proposals, as well as numerous other documents submitted in the procurement process, contain confidential information about virtually every aspect of a contractor's business. Agency disclosure decisions relating to this information should involve a careful evaluation of complex economic and technical considerations as well as an understanding of the competitive environment in which the defense industry operates. They do not. The agencies often do not have the personnel with the specific knowledge necessary to evaluate the detrimental competitive impact disclosure could have upon a contractor, or the interest to adequately pursue or protect the rights of that contractor. Under the ten day limitation the agencies also do not have the time to receive, much less review and comprehend, evidence submitted in support of a contractor's claim of confidentiality.

The Third Circuit's opinion rests on a fiction that confidential commercial information is sufficiently protected by careful agency review. It is not. The FOIA has precluded it. A contractor threatened with disclosure of confidential business data should be afforded the same *de novo* judicial review that FOIA gives to a requester seeking to compel disclosure. In finding that a submitter was not entitled to *de novo* review, the Third Circuit has misconstrued the intent of Congress and has denied

a submitter of confidential information a fundamental due process right to be given an opportunity to protect its trade secret information.

Respectfully submitted,

RICHMOND C. COBURN

THOMAS E. DOUGLASS
One Mercantile Center
Suite 2900
St. Louis, Missouri 63101
(314) 621-8575
Attorneys for the National Security Industrial Association, Amicus Curiae

Of Counsel:

COBURN, CROFT, SHEPHERD, HERZOG & PUTZELL

LEGAL AND SPECIAL TASKS SUBCOMMITTEE NATIONAL SECURITY INDUSTRIAL ASSOCIATION

Supreme Court, U. S.
FILED
JUN 5 1978
MICHAEL RODAK, JR., CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1978

NO. 77-922

CHRYSLER CORPORATION, *Petitioner,*

v.

HAROLD BROWN, ET AL., *Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR HUGHES AIRCRAFT COMPANY AS AMICUS CURIAE

LATHAM & WATKINS
THOMAS L. PFISTER
GEORGE H. WU
555 South Flower Street
Los Angeles, California 90071

Attorneys for Hughes Aircraft Company as Amicus Curiae

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	1
INTEREST OF HUGHES AIRCRAFT COMPANY	2
INTRODUCTION AND SUMMARY OF ARGUMENT	4
ARGUMENT	8
I. The Fourth Exemption to the Freedom of Information Act Was Intended by Congress to Preserve the Confidentiality of All Information of a Commercial or Financial Nature Submitted to the Government by a Private Party Which Would Customarily Not Be Released to the Public by the Party from Whom It Was Obtained	8
A. The Legislative History of the Fourth Exemption Evinces Congress' Intent to Protect the Traditional Privacy and Competitive Interests of Private Parties Who Submit Information to the Government	8
B. The Decision in *National Parks I*, While Purporting to Refine Prior Judicial Interpretations of the Fourth Exemption, Fashioned a Test for Determining Its Applicability Which Is Unsupported by the Legislative History and Inconsistent with the Intended Purpose of the Exemption	19
C. The "Competitive Harm" Test Fashioned by the Court in *National Parks I* Effec-	

Page

tively Vitiates the Protective Purpose of the Fourth Exemption without Promoting the Primary Disclosure Purpose of the Freedom of Information Act 25

II. If The Fourth Exemption Were Properly Interpreted to Give Effect to Its Intended Purpose and Scope, Extensive De Novo Judicial Review of Agency Determinations to Disclose Private Information May Not Be Necessary 29

III. In Light of the Purpose of the Fourth Exemption to Protect Private (As Opposed to Governmental) Interests, the Government May Not Disclose Information Which Falls Within That Exemption 33

IV. Because the Agency Regulations Herein Which Purport to Authorize Disclosure of Information Within the Fourth Exemption Are Fundamentally Inconsistent with the Intended Purpose and Scope of that Exemption, They Cannot Have the Force and Effect of Law, and Disclosure of Information Within the Fourth Exemption Pursuant to Such Regulations Is Not Properly "Authorized by Law" Under 18 U.S.C. § 1905 37

CONCLUSION 44

TABLE OF CITATIONS

Page

Cases

Barceloneta Shoe Corp. v. Compton, 271 F. Supp. 591 (D. Puerto Rico 1967) 20

Blonder-Tongue Lab., Inc. v. University of Illinois Found., 402 U.S. 313 (1971) 4

Bristol-Myers Company v. F.T.C., 424 F.2d 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970) ... 20

Brockway v. Department of Air Force, 518 F.2d 1184 (8th Cir. 1975) 19

Chamber of Commerce v. Legal Aid Society, 423 U.S. 1309 (1975) 43

Charles River Park "A", Inc. v. H.U.D., 519 F.2d 935 (D.C. Cir. 1975) 33

Chrysler Corporation v. Schlesinger, 565 F.2d 1172 (3rd Cir. 1977), *cert. granted sub nom., Chrysler Corporation v. Brown*, No. 77-922, 46 U.S.L.W. 3555 (March 7, 1978) 3, 34

Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971) 29, 30

Consumers Union of U.S., Inc. v. Veterans Administration, 301 F. Supp. 796 (S.D.N.Y. 1969), *appeal dismissed as moot*, 436 F.2d 1363 (2nd Cir. 1971) 19

Continental Oil Co. v. F.P.C., 519 F.2d 31 (5th Cir. 1975), *cert. denied sub nom., Superior Oil Company v. F.P.C.*, 425 U.S. 971 (1976) 34

Dickerson v. United States Steel Corp., 12 E.P.D. ¶ 11,095 (E.D. Pa. 1976) 36

E.P.A. v. Mink, 410 U.S. 73 (1973) 27, 34

Exner v. F.B.I., 542 F.2d 1121 (9th Cir. 1976) 27

Page

General Dynamics Corp. v. Marshall, 16 E.P.D. ¶ 8128 (8th Cir. 1978) 34

General Electric Co. v. Gilbert, 429 U.S. 125 (1976) 39, 42

Getman v. N.L.R.B., 450 F.2d 670 (D.C. Cir. 1971) 19

Gibson Wine Co., Inc. v. Snyder, 194 F.2d 329 (D.C. Cir. 1952) 41

G.S.A. v. Benson, 415 F.2d 878 (9th Cir. 1969) 20

Hughes Aircraft Company v. Schlesinger, 384 F. Supp. 292 (C.D. Cal. 1974), *appeal pending*, No. 75-1064 (9th Cir.) 2, 29, 35

Joseph v. United States Civil Service Commission, 554 F.2d 1140 (D.C. Cir. 1977) 39, 41, 43

M.A. Schapiro & Co. v. S.E.C., 339 F. Supp. 467 (D.D.C. 1972) 21

Marshall v. Barlow's, Inc., 46 U.S.L.W. 4483 (May 23, 1978) 10

N.L.R.B. v. Sears, Roebuck & Co., 421 U.S. 132 (1975) 25

N.L.R.B. v. Wyman-Gordon Co., 394 U.S. 759 (1969) 41

National Parks & Conservation Ass'n. v. Morton, 351 F. Supp. 404 (D.D.C. 1972), *reversed*, 498 F.2d 765 (D.C. Cir. 1974) 21

National Parks & Conservation Ass'n. v. Morton, 498 F.2d 765 (D.C. Cir. 1974) 4, 19-25, 27, 28, 30, 31, 32, 40

National Parks & Conservation Ass'n. v. Kleppe, 547 F.2d 673 (D.C. Cir. 1976) 23, 24, 25

Open America v. Watergate Special Prosecution Force, 547 F.2d 605 (D.C. Cir. 1976) 27

Page

Pennzoil Co. v. F.P.C., 534 F.2d 627 (5th Cir. 1976) 35, 36

Pesikoff v. Secretary of Labor, 501 F.2d 757 (D.C. Cir.), *cert. denied*, 419 U.S. 1038 (1974) 41

Pickus v. U.S. Board of Parole, 507 F.2d 1107 (D.C. Cir. 1974) 41, 43

Sanday v. Carnegie-Mellon University, 11 E.P.D. ¶ 10,659 (W.D.Pa. 1975) 36

Sears, Roebuck & Co. v. G.S.A., 553 F.2d 1378 (D.C. Cir.), *cert. denied*, 98 S.Ct. 74 (1977) 25

Skidmore v. Swift & Co., 323 U.S. 134 (1944) 42

Sterling Drug Inc. v. F.T.C., 450 F.2d 698 (D.C. Cir. 1971) 20

Union Oil of California v. F.P.C., 542 F.2d 1036 (9th Cir. 1976) 35

Weber v. Kaiser Aluminum & Chemical Corp., 563 F.2d (5th Cir. 1977) 37

Westinghouse Electric Corp. v. Schlesinger, 542 F.2d 1190 (4th Cir. 1976), *cert. denied sub nom., Brown v. Westinghouse Electric Corp.*, 431 U.S. 924 (1977) 3, 25, 28, 29, 34

Statutes and Regulations

Act of June 11, 1946, ch. 324, Section 3, 60 Stat. 238 8

5 U.S.C. § 301 (1977) 38, 41

5 U.S.C. § 552 (1977) ..... *passim*

5 U.S.C. § 553 (1977) 40, 41, 42

5 U.S.C. § 706 (1977) 29

18 U.S.C. § 1905 (1970) 7, 37, 38, 42, 43, 44

Page

42 U.S.C. § 2000e-8(e) 43

Rule 23(1)(c) of the Revised Rules of the United States Supreme Court (1977) 4

41 C.F.R. Part 60-40 (1977) 2, 7, 37, 38-43, 44

43 C.F.R. § 2.13(h) (1977) 28

38 Fed. Reg. 3192 (February 2, 1973) 38, 39, 40, 43

40 Fed. Reg. 8797 (March 3, 1975) 31

Executive Order 11246, 30 Fed. Reg. 12319 (1965) 2, 38, 41

Executive Order 11375, 32 Fed. Reg. 14303 (1967) 2, 38, 41

Congressional Materials

(a) Bills and Resolutions

S. 1567, 87th Cong., 1st Sess. (1961) 11

S. 1663, 88th Cong., 1st Sess. (1963) 8, 9, 11, 12

S. 1666, 88th Cong., 1st Sess. (1963) 8, 9, 11

S. 1160, 89th Cong., 1st Sess. (1965) 13, 15

S. 1336, 89th Cong., 1st Sess. (1965) 15

H.R. 5012, 89th Cong., 1st Sess. (1965) 13, 14

(b) Congressional Hearings

Administrative Procedure Act: Hearings on S. 1160 and S. 1336 before the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, United States Senate, 89th Cong., 1st Sess. (1965) 15

Federal Public Records Law (Part 1): Hearings on H.R. 5012 before a Subcommittee of the Committee on Government Operations, House of Representatives, 89th Cong., 1st Sess. (1965) 14

Page

Administrative Procedure Act: Hearings on S. 1663 before the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, United States Senate, 88th Cong., 2d Sess. (1964) 11

Freedom of Information: Hearings on S. 1666 and S. 1663 (in part) before the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, United States Senate, 88th Cong., 1st Sess. (1964) 9, 10, 11

(c) Congressional Reports, Documents and Committee Prints

H. Rept. No. 1497, 89th Cong., 2d Sess. (1966) 17, 18, 20, 33, 34

S. Rept. No. 813, 89th Cong., 1st Sess. (1965) 4, 16, 17, 18, 20

S. Rept. No. 1219, 88th Cong., 2d Sess. (1964) 12, 13, 16

S. Rept. No. 93-854, 93 Cong., 2d. Sess. (1974) 34

H. Rept. No. 92-1419, 92 Cong., 2d Sess. (1972) 34

Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, United States Senate, 93d Cong., 2d Sess., *Freedom of Information Act Source Book: Legislative Materials, Cases, Articles* (Committee Print 1974) 8, 12, 13, 14, 16, 17

(d) Congressional Record

109 Cong. Rec. 9958 (1963) 9

110 Cong. Rec. 17086-17089 (1964) 13

110 Cong. Rec. 17666-17668 (1964) 13

111 Cong. Rec. 26821 (1965) 17

112 Cong. Rec. 13661 (1966) 17

Page

Commentaries

Clement, *The Rights of Submitters to Prevent Agency Disclosure of Confidential Business Information: The Reverse Freedom of Information Act Lawsuit,* 55 Tex. L. Rev. 587 (1977) 32

K. C. Davis, *The Information Act: A Preliminary Analysis,* 34 U. Chi. L. Rev. 761 (1967) 18, 19, 26, 27

K. C. Davis, *Administrative Law Text* (3d ed. 1972) 39

K. C. Davis, *Administrative Law Treatise* (1958) 30, 39, 42

K. C. Davis, *Administrative Law Treatise, 1970 Supplement* (1971) 19

K. C. Davis, *Administrative Law of the Seventies* (1976) 18, 22, 42

Koch, *Public Procedures for the Promulgation of Interpretative Rules and General Statements of Policy,* 64 Geo. L. J. 1047 (1976) 42

3 Mezines, Stein and Gruff, *Administrative Law* (1977) 41

Note, *The Freedom of Information Act: A Seven-Year Assessment,* 74 Colum. L. Rev. 895 (1974) 20, 21

Note, *In Camera Inspections Under the Freedom of Information Act,* 41 U. Chi. L. Rev. 74 (1974) 26

Patten & Weinstein, *Disclosure of Business Secrets Under the Freedom of Information*

Page

Act: Suggested Limitations, 29 Ad. L. Rev. 193 (1977) 23, 25, 28

Project, *Governmental Information and the Rights of Citizens,* 73 Mich. L. Rev. 971 (1975) 19, 23, 33, 36

U.S. Dept. of Justice, *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act* (1967), *reprinted in* 20 Ad. L. Rev. 263 (1968) 14, 19, 28

Miscellaneous

Lardner, *Use, Abuse of Freedom of Information Act,* Washington Post, July 27, 1976 27

Shorr, *Telling Tales: How Law Is Being Used to Pry Business Secrets from Uncle Sam's Files,* Wall Street Journal, May 9, 1977 27

Webster's Third New International Dictionary 476 (unabridged ed. 1966) 18

In the
Supreme Court of the United States

OCTOBER TERM, 1978

NO. 77-922

CHRYSLER CORPORATION, *Petitioner,*

v.

HAROLD BROWN, ET AL., *Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR HUGHES AIRCRAFT COMPANY AS AMICUS CURIAE

QUESTIONS PRESENTED

1. Whether the fourth exemption to the Freedom of Information Act, 5 U.S.C. § 552(b)(4), was intended by Congress to protect the confidentiality of all information of a commercial or financial nature submitted to the government by a private party which would customarily not be released to the public by the party from whom it was obtained.

2. In light of the purpose and proper scope of the fourth exemption to the Freedom of Information Act:

(a) Whether a person who has supplied to the government information claimed to be within the fourth exemption is entitled to a trial *de novo* in a federal court action to prevent government disclosure of such information;

(b) Whether the government may disclose information which falls within that exemption; and

(c) Whether the agency regulations in 41 C.F.R. Part 60-40 may authorize disclosure of information which falls within that exemption.

INTEREST OF HUGHES AIRCRAFT COMPANY

In 1974, Hughes Aircraft Company (*"Amicus"*) sued to enjoin the government from releasing a written affirmative action plan ("AAP") which it developed for one of its facilities.[1] The district court denied the relief sought by *Amicus,*[2] but granted an injunction restraining disclosure of the information at issue pending resolution of *Amicus'* appeal to the Ninth Circuit Court of Appeals.

On May 5, 1976, *Amicus* argued its appeal before the Ninth Circuit and the matter was submitted for decision.

---

[1] *Amicus* is a privately held Delaware corporation which transacts business throughout the United States. A substantial portion of its business consists of fulfilling contracts or subcontracts with various United States Government agencies. As a government contractor, *Amicus* is required to develop an affirmative action program in accordance with Executive Order 11246, 30 Fed. Reg. 12319 (1965), as amended by Executive Order 11375, 32 Fed. Reg. 14303 (1967), and regulations promulgated thereunder. The affirmative action program can be broadly described as various positive efforts by the contractor to insure and promote the maximum utilization in its work force of available minorities and females in the labor market.

In order to monitor affirmative action programs, the Department of Labor's Office of Federal Contract Compliance Programs ("OFCCP") and its various compliance agencies conduct both on-site and off-site reviews of each contractor's program. To facilitate the off-site review process, compliance agencies require each contractor to submit certain written information regarding the affirmative action program. This written information termed an Affirmative Action Plan (sometimes referred to herein as "AAP") is the subject of *Amicus'* suit referred to in the text and the case before this Court.

[2] *Hughes Aircraft Company v. Schlesinger,* 384 F. Supp. 292 (C.D. Cal. 1974), *appeal pending,* No. 75-1064 (9th Cir.).

On April 14, 1977, the Ninth Circuit withdrew the case from submission pending this Court's ruling on the government's petition for certiorari in a related case.[3] Upon this Court's denial of certiorari in that case, *Amicus'* appeal was again submitted for decision in May, 1977. *Amicus* has advised the Ninth Circuit that the petition for certiorari was granted in the instant case, and *Amicus* does not anticipate a decision by the Ninth Circuit prior to this Court's decision.

Many of the issues raised in *Amicus'* appeal to the Ninth Circuit are substantially identical to those raised in the instant case. Because the Ninth Circuit is obviously awaiting guidance from this Court on those issues, *Amicus* has a vital interest in the outcome of this case.

Moreover, one of the issues presented by *Amicus* to the Ninth Circuit is whether the district court applied an erroneous test in determining that the information at issue did not fall within the fourth exemption to the Freedom of Information Act, 5 U.S.C. § 552(b)(4).[4] In the instant case, the district court found that substantially identical information *was* within the fourth exemption and this finding was not challenged by the government on appeal.[5] *Amicus* submits that a proper resolution of the questions presented by petitioner in this case demands a full consideration by this Court of the threshold issue of the purpose and scope of the fourth exemption. *Amicus* therefore has a special interest in briefing

---

[3] *Westinghouse Electric Corp. v. Schlesinger,* 542 F.2d 1190 (4th Cir. 1976), *cert. denied sub nom., Brown v. Westinghouse Electric Corp.,* 431 U.S. 924 (1977).

[4] Section 552(b)(4) exempts from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential".

[5] *Chrysler Corporation v. Schlesinger,* 565 F.2d 1172, 1182-1183 (3rd Cir. 1977), *cert. granted sub nom., Chrysler Corporation v. Brown,* No. 77-922, 46 U.S.L.W. 3555 (March 7, 1978.) *See also* Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit at 13-14.

the Court on this threshold issue and demonstrating the impact of its resolution upon each of the questions presented by petitioner.

INTRODUCTION AND SUMMARY OF ARGUMENT

Each of the three questions presented by petitioner raises the same fundamental "subsidiary question fairly comprised therein",[6] *i.e.*, what is the proper scope of the fourth exemption to the Freedom of Information Act, 5 U.S.C. § 552(b)(4)? *Amicus* submits that the fourth exemption was intended by Congress to protect the confidentiality of all information of a commercial or financial nature submitted to the government by a private party which "would customarily not be released to the public by the person from whom it was obtained."[7] This definition of the scope of the fourth exemption is amply supported by the legislative history and is consistent with the fundamental purposes of the Freedom of Information Act as applied to information submitted by private parties to the government.

Nevertheless, under the "prevailing" judicial interpretation of the scope of the fourth exemption initially set forth in *National Parks & Conservation Ass'n. v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) (*"National Parks I"*), protection is afforded only to that commercial or financial information submitted to the government by a private party which, if disclosed, is likely to cause substantial harm to the competitive position of the submitter. Such a restrictive interpretation of the scope of the exemption is contrary to the legislative history and inconsistent with the basic purposes of the Act.

[6] Rule 23(1)(c) of the Revised Rules of the United States Supreme Court. *Cf. Blonder-Tongue Lab., Inc. v. University of Illinois Found.*, 402 U.S. 313, 320 n.6 (1971).

[7] S. Rept. No. 813, 89th Cong., 1st Sess. 9 (1965).

The primary purpose of this *Amicus* Brief is to demonstrate that a threshold determination by this Court of the purpose and scope of the fourth exemption is essential to the proper resolution of each of the specific questions presented by petitioner. In particular:

(1) With respect to the question of *de novo* review, if the fourth exemption were properly construed as protecting the confidentiality of all commercial information submitted to the government which "would customarily not be released to the public by the person from whom it was obtained", administrative agencies charged with the initial disclosure decision would be capable of making a rational determination of the applicability of the exemption — notwithstanding the narrow time frame allotted by the Act for such a decision.[8] The question whether such information was "customarily disclosed" to the public would turn on evidence of procedures adopted internally by the submitter to limit dissemination of the information or, perhaps, evidence of treatment of similar information by other submitters. If judicial review of a decision to disclose were necessary, a federal court may be able to ascertain from the administrative record alone whether the agency properly determined the applicability of the fourth exemption.

On the other hand, if the fourth exemption were improperly defined as protecting the confidentiality of commercial and financial information submitted to the government by private parties only where disclosure of the information is likely to cause substantial harm to the competitive position of the

[8] The 1974 amendments to the Freedom of Information Act require agencies to make initial disclosure decisions within 10 working days after receiving a request under the Act. 5 U.S.C. § 552(a)(6)(A)(i). A maximum of 10 additional working days is provided for such a decision under "unusual circumstances". 5 U.S.C. § 552(a)(6)(B).

submitter, the administrative agencies would be incapable in the vast majority of cases of finding the facts necessary to determine whether the information was within the exemption — particularly given the statutory time restraints for such a determination. Extensive and costly *de novo* review by a federal court on the issue of competitive harm would be required.

(2) The question whether the fourth exemption is "mandatory" or "permissive" also cannot properly be resolved without a preliminary determination of the nature of the interests Congress sought to protect by the fourth exemption and the degree of protection intended. Again, it is submitted that the fourth exemption was primarily intended by Congress to protect the interests of private parties in preserving the confidentiality of commercial and financial information submitted to the government which would not customarily be disclosed to the public by the private party. In so doing, Congress determined the "public interest" by striking a balance between the interest in governmental disclosure and the interest in preserving the confidentiality of private information submitted to the government. Congress could not at the same time have intended to confer upon the agencies of the federal government the broad discretion to upset that balance by disclosing information within the fourth exemption based upon their own *ad hoc* determinations of the "public interest". Moreover, even if this Court should find that Congress intended to confer upon the agencies the discretion to disclose information within the fourth exemption, the proper definition of the purpose and scope of the exemption is necessary to determine whether an agency decision to disclose exempt information constitutes an abuse of such discretion.

(3) Finally, in determining whether agency regulations which purport to authorize disclosure of information within the fourth exemption constitute "authorization by law" to disclose such information within the meaning of 18 U.S.C. § 1905,[9] it must be determined in the first instance whether such regulations have the force and effect of law. *Amicus* submits that the so-called "disclosure regulations" here at issue, 41 C.F.R. Part 60-40,[10] are so inconsistent with the intended purpose and scope of the fourth exemption that they cannot have the force and effect of law, and therefore cannot constitute "authorization by law" within the meaning of 18 U.S.C. § 1905.

Simply stated, the threshold issue in this case is the determination of the purpose and proper scope of the fourth exemption to the Freedom of Information Act. As a party to a similar case in which this threshold issue is expressly presented for review, *Amicus* has a vital interest that the issue be examined directly and fully by this Court rather than resolved indirectly by implication from the answers to the questions presented by petitioner.

---

[9] Section 1905 prohibits any governmental official or employee from disclosing a broad range of private commercial and financial information obtained from private parties unless such disclosure is "authorized by law". *See* note 81, *infra*.

[10] *See* note 82, *infra*.

ARGUMENT

I

THE FOURTH EXEMPTION TO THE FREEDOM OF INFORMATION ACT WAS INTENDED BY CONGRESS TO PRESERVE THE CONFIDENTIALITY OF ALL INFORMATION OF A COMMERCIAL OR FINANCIAL NATURE SUBMITTED TO THE GOVERNMENT BY A PRIVATE PARTY WHICH WOULD CUSTOMARILY NOT BE RELEASED TO THE PUBLIC BY THE PERSON FROM WHOM IT WAS OBTAINED.

A. The Legislative History of the Fourth Exemption Evinces Congress' Intent to Protect the Traditional Privacy and Competitive Interests of Private Parties Who Submit Information to the Government.

The Freedom of Information Act, 5 U.S.C. § 552 (the "Act"), was enacted in response to the ineffectiveness of the initial section 3[11] of the Administrative Procedure Act ("APA").[12] Various bills were proposed in the 84th, 85th, 86th and 87th Congresses to amend and strengthen the public information section of the APA, but none was seriously acted upon.[13] On June 4, 1963, two bills were introduced in the Senate. The first bill, S. 1663, 88th Cong., 1st Sess. (1963), proposed to amend the entire APA, while the second bill, S. 1666, 88th Cong., 1st Sess.

[11] Act of June 11, 1946, ch. 324, Section 3, 60 Stat. 238.

[12] *See Discussion of the Legislative History of the Freedom of Information Act* ("Discussion of Legislative History") contained in Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, United States Senate, 93d Cong., 2d Sess., *Freedom of Information Act Source Book: Legislative Materials, Cases, Articles* 6-7 (Committee Print 1974) ("Source Book").

[13] *See* Discussion of Legislative History contained in Source Book at 7.

(1963), which was identical to section 3 of S. 1663, proposed to amend only section 3 of the APA.[14]

S. 1666 (section 3 of S. 1663) did not initially contain a separate subsection which provided for exemptions to the general disclosure requirements of the Act.[15] However, subsection (c) of S. 1666 did list three exceptions to the general obligation to disclose agency records, all of which were aimed at protecting *governmental* interests in confidentiality.[16]

In the course of the 1963 Senate hearings on S. 1666 ("1963 Senate Hearings"), strenuous objections were expressed regarding the potential impact of such a bill upon the interests of *private* submitters of information to the government. These objections reflect a concern for the protection of traditional privacy and competitive interests of private parties who submit information to the government.[17] G. d'Andelot Belin, General Counsel of the Treasury Department, for example, observed that ". . . one of the worst aspects of the present bill is that it would invade the traditional rights of privacy of the private citizen and require the Government to disclose the citizen's affairs to any business competitor, neighbor, prying relative, or criminal who seeks, for whatever reason, to gain access to such information." He concluded that "[w]e can see no reason for changing the

[14] The two bills were proposed simultaneously in order to focus attention on the need to make the revisions and to expedite the action in that regard. 109 Cong. Rec. 9958 (1963) (remarks of Senator Long).

[15] S. 1666 is reprinted in Freedom of Information: Hearings on S. 1666 and S. 1663 (in part) before the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, United States Senate, 88th Cong., 1st Sess. 1-2 (1964) ("1963 Senate Hearings").

[16] The three exceptions in subsection (c) of S. 1666 are similar to the first three exemptions of the current Freedom of Information Act, 5 U.S.C. § 552(b)(1)-(3).

[17] As this Court has recently confirmed, the right of privacy is not enjoyed exclusively by individuals; most businesses

ground rules of American business so that any person can force the Government to reveal information which relates to the business activities of his competitor."[18] Norbert A. Schlei, then Assistant Attorney General, Office of Legal Counsel, succinctly characterized the problem as follows:

> "A second problem area lies in the large body of the Government's information involving private business data and trade secrets, the disclosure of which could severely damage individual enterprise and cause widespread disruption of the channels of commerce. Much of this information is volunteered by employers, merchants, manufacturers, carriers, exporters, and other businessmen and professional people for purposes of market news services, labor and wage statistics, commercial reports, and other Government services which are considered useful to the cooperating reporters, the public and the agencies. Perhaps the greater part of such information is exacted, by statute,

(whether publicly held or privately owned) also have reasonable expectations of privacy based upon historical experience. *See Marshall v. Barlow's, Inc.*, 46 U.S.L.W. 4483, 4484-4485 (May 23, 1978).

[18] 1963 Senate Hearings at 173 and 174. *See also* 1963 Senate Hearings at 89 (Statement of Howard Bell, Vice President of the National Association of Broadcasters):

> "Privacy has historically been respected by the Government in financial matters which, for competitive purposes, should not be made publicly available.
>
> • • •
>
> We recognize the difficulties that arise when an attempt is made to balance the equities of access to information and invasion of personal privacy. However, we do feel that some provision must be made in the law to preclude any unwarranted invasion of personal privacy when information is required by administrative rule and is submitted in confidence. In our view, in such a case the equities are on the side of not requiring disclosure because the public value is nil, while the damage of such disclosure to a business enterprise could be substantial."

> in the course of necessary regulatory or other governmental functions.
>
> *Again, not only as a matter of fairness, but as a matter of right, and as a matter basic to our free enterprise system, private business information should be afforded appropriate protection, at least from competitors.*" (Emphasis added.)[19]

Three additional exceptions were suggested in the 1963 Senate Hearings to deal with the lack of protection for business confidentiality. The first "would pertain to financial and other business matters which are 'submitted in confidence pursuant to statute or administrative rules or regulations, the disclosure of which would be a violation of personal privacy.'"[20] The second would simply include "trade secrets".[21] The third would adopt the framework of S. 1567, 87th Cong., 1st Sess. (1961), a bill passed over in the prior congressional term.[22] S. 1567 contained a specific "exceptions" section which included an exemption from disclosure for materials "submitted in confidence pursuant to statute or published rule."

Following the 1963 Senate Hearings, several revisions were made in S. 1666 and additional hearings were conducted on July 21 through 23, 1964.[23] As introduced at those hearings, subsection (c) of S. 1666 (section 3 of

[19] 1963 Senate Hearings at 199.

[20] 1963 Senate Hearings at 90 (Statement of Howard Bell).

[21] 1963 Senate Hearings at 91 and 169 (Statements of Bernard Fensterwald, Jr., Chief Counsel to the Senate Subcommittee on Administrative Practice and Procedure).

[22] 1963 Senate Hearings at 153-154 (Statement of Robert M. Benjamin, Chairman American Bar Association Special Committee on Code of Administrative Procedure).

[23] Administrative Procedure Act: Hearings on S. 1663 before the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, United States Senate, 88th Cong., 2d Sess. (1964) ("1964 Senate Hearings"). These hearings were on the entire S. 1663 which included S. 1666. *See* note 14 and accompanying text, *supra*.

S. 1663) was amended, in relevant part, to add a fourth exception for "trade secrets".[24] The failure of this exception to protect confidential business information other than trade secrets was criticized during the additional hearings.[25]

The full concern for the confidentiality of private business information expressed throughout the 1963 and 1964 Senate Hearings was recognized by the Senate Judiciary Committee in its Report No. 1219, "Clarifying and Protecting the Right of the Public to Information and for Other Purposes". S. Rept. No. 1219, 88th Cong., 2d Sess. (July 22, 1964).[26] Senate Report No. 1219 approved a modification of the fourth exception to include not only trade secrets but also "other information obtained from the public and customarily privileged or confidential." The amendment is explained in the Senate Report as follows:[27]

---

[24] 1964 Senate Hearings at 3.

[25] *See e.g.*, Treasury Department Detailed Statement on S. 1663, As Revised, to Amend the APA, as reported in 1964 Senate Hearings at 177C, which states:

> "*Exemption (4)* in subsection (c) for 'trade secrets' is too limited to reach the confidential business information which the Department understands that the subcommittee staff agrees should be protected. The meaning of the term 'trade secrets' is not clear, particularly as it is used in statutes in conjunction with other types of business information, as in 18 U.S.C. 1905 and 15 U.S.C. 46, 78x, and 79v. The Department strongly recommends that exemption should be revised to exempt 'records, or parts thereof, which contain information obtained from the public which is customarily privileged or otherwise confidential.' This would cover private information submitted voluntarily or involuntarily and recognized by statute, regulation, or judicial decision as protected against unauthorized disclosure."

See also 1964 Senate Hearings at 248 (comments of Professor Kenneth Culp Davis on the failure of the proposed bill to protect confidential communications between agencies and private parties).

[26] *Reprinted in* Source Book at 86 *et seq*.

[27] *See* Source Book at 91.

> "This exception is necessary to protect the confidentiality of information which is obtained by the Government through questionnaires or other inquiries, but which would customarily not be released to the public by the person from whom it was obtained. This would include business sales statistics, inventories, customer lists, and manufacturing processes. It would also include information customarily subject to the doctor-patient, lawyer-client, and other such privileges."

The changes recommended in Senate Report No. 1219 were adopted and S. 1666 was amended. The revised version of the bill was passed by the Senate on July 28, 1964.[28] No action was taken by the House of Representatives on the bill before adjournment.[29]

In the 89th Congress, on February 17, 1965, a modified form of S. 1666 was reintroduced into the Senate as S. 1160, 89th Cong., 1st Sess. (1965), and in the House of Representatives as H.R. 5012, 89th Cong., 1st Sess. (1965). In both S. 1160 and H.R. 5012, the fourth exemption had been modified by substituting the words "commercial or financial" for the word "other" and deleting the word "customarily". No explanation for these modi-

---

[28] 110 Cong. Rec. 17086-17089 (1964).

On July 31, 1964, Senator Humphrey moved to reconsider S. 1666 for several reasons. As to the fourth exemption, as amended, he expressed his concern that the clause as written, which included the words "customarily privileged and confidential", would not protect the confidentiality of such items as wage data submitted to the Bureau of Labor Statistics. Senator Humphrey suggested that the fourth exemption be amended to read "(4) trade secrets and information obtained from the public in confidence or customarily privileged or confidential." Senator Long persuaded Senator Humphrey that his amendment was unnecessary, stressing the fact that the only information which should be considered confidential would be information which had *customarily* been considered confidential. 110 Cong. Rec. 17666-17668 (1964).

[29] *See* Discussion of Legislative History, Source Book at 8.

fications has been found in the legislative history.[30] The revised version exempted "trade secrets and commercial or financial information obtained from the public and privileged or confidential."

The comments in The House of Representatives Hearings on H.R. 5012 on March 30, 31 and April 1, 2 and 5, 1965,[31] do not specifically address the amendments to the language of the exemption.[32] Rather, they focus on the question whether the exemption, as amended, covered information which was submitted to the government in confidence and received by the government under a pledge of confidentiality.[33] Several witnesses advised the subcommittee members to clarify the meaning of the fourth exemption in the legislative history through the language of the Committee Report by interpreting the clause in a manner which would strengthen the protection of business information submitted to the government in confidence.[34]

In the Senate Hearings on S. 1160 on May 12, 13, 14 and 21, 1965,[35] the same criticisms were voiced regarding

[30] One commentator has interpreted the deletion of the word "customarily" from the language of the fourth exemption as demonstrating, not an intent to alter the accepted meaning of the word "confidential" which it modified, but rather an intent to preclude the use of the word "customarily" to imply a privilege or confidentiality created simply by *agency* custom. *See* U.S. Dept. of Justice, *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act* 33 (1967) ("A. G. Memorandum"), *reprinted in* Source Book at 232.

[31] Federal Public Records Law (Part 1): Hearings on H.R. 5012 before a Subcommittee of the Committee on Government Operations, House of Representatives, 89th Cong., 1st Sess. (1965) ("1965 House Hearings").

[32] The only criticism directed to the language changes was made by William Feldesman in the "Reply from the National Labor Relations Board" which stated:

> "The phrase 'commercial or financial' unnecessarily limits this exception. The equivalent exception in S. 1666 (88th Cong. 2d sess.), as passed by the Senate (110 Congressional Record 17080 [sic]), contained more preferable language, i.e., 'trade secrets and other information obtained from the public and customarily privileged or confidential'." 1965 House Hearings at 256.

Indeed, some commentators labored under the misconception that the fourth exemption had not been amended at all. *See e.g.*, 1965 House Hearings at 41 (Statement of H. T. Herrick, General Counsel, Federal Mediation and Conciliation Service).

[33] *See e.g.*, 1965 House Hearings at 55 (Statement of Fred Burton Smith, Acting General Counsel, Treasury Department): "Exemption (4) is a most necessary one, this is the trade secrets one, but it is not clear whether it is broad enough to include both information submitted to the Government under a pledge of confidentiality and information which is tendered to the Govenment in confidence." *See also* 1965 House Hearings at 185 (Statement of Andrew J. Biemiller, Director, Department of Legislation, AFL-CIO); 219-220 (Reply From Department of Defense); 229 (Reply From Department of The Treasury); 241 (Reply from Federal Communications Commission).

[34] *See e.g.*, 1965 House Hearings at 205, wherein Joseph Campbell in the "Reply from the General Accounting Office" states that:

> "In addition to the reasons stated above for the exclusion of information furnished by informants or otherwise submitted in confidence, it is evident that if such information and its sources are divulged to the public, information from such sources would no longer be available to the Government. Accordingly, we recommend that an additional exception be added to subsection (c) to the effect that disclosure is not required as to information submitted in confidence pursuant to statute or published rule or regulation or it be made clear in the legislative history that such information is of a privileged or confidential nature' as that term is used in subsection (c)(4). It should also be made clear that subsections (c)(3) or (c)(4) include any information the disclosure of which would be a violation of 18 U.S.C. 1905."

See also 1965 House Hearings at 187 (Statement of Kermit Overby, Director, Legislation and Research Department, Rural Electric Cooperative Association); 193 (Statement of Vincent T. Wasilewski, President, National Association of Broadcasters).

[35] Administrative Procedure Act: Hearings on S. 1160 and S. 1336 before the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, United States Senate, 89th Cong., 1st Sess., (1965) ("1965 Senate Hearings"), As in the case of Senate bills S. 1666 and 1663, S. 1160 was aimed at amending only section 3 of the APA while S. 1336, which contained the language of S. 1160, sought to amend the entire APA. 1965 Senate Hearings at 6-7 and 9-10.

the failure of the fourth exemption, as amended, to clarify the issue of the protection afforded information submitted to the government in confidence.[36] Further, there were additional statements regarding the need for protection of information submitted in applications for federal loans.[37]

The reports subsequently issued by the Senate and the House on S. 1160 do not directly comment on the modification of the language of the fourth exemption from the language in S. 1666 passed by the Senate the prior year. Instead, in the Senate report issued on S. 1160, S. Rept. No. 813, 89th Cong., 1st Sess., (October 4, 1965),[38] the "detailed description" of the fourth exemption is taken substantially verbatim from the comment in Senate Report No. 1219 on S. 1666.[39] Thus, Senate Report No. 813 states that the exemption "is necessary to protect the confidentiality of information which is obtained by the Government through questionnaires or other inquiries *but which would customarily not be released to the public by the person from whom it was obtained.*" (Emphasis added.)[40] Senate Report No. 813 also contains a reference to data provided to lending agencies by borrowers,

[36] *See e.g.*, 1965 Senate Hearings at 292 and 295 (Statement of Philip A. Loomis, Jr., General Counsel, Securities and Exchange Commission); 383 (Analysis of S. 1336 by the U.S. Department of Agriculture); 436 (Department of Labor's Comments on S. 1336).

[37] *See e.g.*, 1965 Senate Hearings at 356 (Statement of National Rural Electric Cooperative Association on S. 1336); 406 (General Counsel of the Department of Commerce).

[38] *Reprinted in* Source Book at 36 *et seq*.

[39] The only major change in the comment was the additional recognition of privileged information between a borrower and a lending agency. *Compare* S. Rept. No. 1219, *reprinted in* Source Book at 91, *with* S. Rept. No. 813, *reprinted in* Source Book at 44.

[40] *Reprinted in* Source Book at 44.

reflecting concerns expressed in the 1965 Senate Hearings on this point.[41]

The House Report on S. 1160, H. Rept. No. 1497, 89th Cong., 2d Sess., (May 9, 1966)[42] similarly states that the exemption "would assure the confidentality of information obtained by the Government through questionnaires or through material submitted . . . [and] . . . [i]t exempts such material *if it would not customarily be made public by the person from whom it was obtained by the Government.*" (Emphasis added.)[43] As urged by the various witnesses in the 1965 House Hearings, the House Report goes on to state that the exemption "would also include information which is given to an agency in confidence, since a citizen must be able to confide in his Government. Moreover, where the government has obligated itself in good faith not to disclose documents or information which it receives, it should be able to honor such obligations."[44]

The Senate passed S. 1160, as amended, on October 13, 1965.[45] The House of Representatives passed the bill on June 20, 1966.[46]

Although the legislative history of the fourth exemption is not free of ambiguity, it is clear from the foregoing survey of the congressional hearings and reports that the exemption was enacted by Congress in response to expressions of concern for the protection of the privacy and competitive interests of private submitters.

[41] *See* S. Rept. No. 813, 89th Cong., 1st Sess. 9 (1965) wherein it is stated: "Specifically it [the fourth exemption] would include any commercial, technical, and financial data, submitted by an applicant or a borrower to a lending agency in connection with any loan application or loan."

[42] *Reprinted in* Source Book at 22 *et seq*.

[43] *Reprinted in* Source Book at 31.

[44] *Id*.

[45] 111 Cong. Rec. 26821 (1965).

[46] 112 Cong. Rec. 13661 (1966).

The prevailing congressional expression of the purpose and scope of the fourth exemption is that set forth in both Senate Report No. 813 and House Report No. 1497 indicating that Congress intended to protect those privacy and competitive interests by preserving the confidentiality of all information customarily not disclosed to the public by the submitter. Nothing in the language of the exemption[47] or in the legislative history supports a more restrictive view of the protective purpose and scope of the exemption.[48]

---

[47] "Confidential" is defined in *Webster's Third New International Dictionary* 476 (unabridged ed. 1966) as follows: "1: communicated, conveyed, acted on, or practiced in confidence: known only to a limited few: *not publicly disseminated* . . . ." (Emphasis added.)

[48] While it has been argued that the Senate and House Reports are inconsistent with the language of the fourth exemption, *see* K. C. Davis, *The Information Act: A Preliminary Analysis*, 34 U. Chi. L. Rev. 761, 789-790 (1967) ("Davis, Preliminary Analysis"), the basis for that criticism has not focused on the definition of the word "confidential" but rather on the reports' interpretation of the coverage of the exemption to include non-commercial and non-financial information. *E.g.*, both reports would seemingly extend the scope of the fourth exemption to such information as doctor-patient correspondence. However, Professor Davis agrees that the scope of the fourth exemption protection for confidential commercial or financial information is not limited to merely that information which will have a competitive effect if disclosed. K. C. Davis, *Administrative Law of the Seventies*, § 3A.19 at 91 (1976). Moreover, on the "confidentiality" issue, the reports reflect the specific comments and discussions on the hearings on the respective bills. *See* notes 39 and 41 and accompanying text, *supra; see also* language in House Report No. 1497 regarding "material submitted and disclosures made in procedures such as the mediation of labor-management controversies" paraphrases the statements made by H. T. Herrick, General Counsel for the Federal Mediation and Conciliation Service. 1965 House Hearings at 44-46. Likewise, the comments on "information which is given to an agency in confidence" refers to the statements made by Fred Burton Smith, Acting General Counsel to the Treasury Department. 1965 House Hearings at 55.

B. The Decision in National Parks I, While Purporting to Refine Prior Judicial Interpretations of the Fourth Exemption, Fashioned a Test for Determining Its Applicability Which Is Unsupported by the Legislative History and Inconsistent with the Intended Purpose of the Exemption.

In construing and applying the language of the fourth exemption, the courts have required a showing of each of the three distinct elements delineated in that exemption. In order to fit within the exemption, information (other than a trade secret) must be (1) commercial or financial in nature, (2) obtained from a person and (3) privileged or confidential. *See e.g., Brockway v. Department of Air Force,* 518 F.2d 1184, 1188 (8th Cir. 1975); *Getman v. N.L.R.B.*, 450 F.2d 670, 673 (D.C. Cir. 1971); *Consumers Union of U.S., Inc. v. Veterans Administration,* 301 F. Supp. 796, 802-803 (S.D.N.Y. 1969), *appeal dismissed as moot,* 436 F.2d 1363 (2nd Cir. 1971). As in the instant case, the first two elements are generally easy to ascertain and not disputed.[49] The dispute over the purpose and scope of the fourth exemption in the case law, therefore, has generally focused upon the construction of the term "confidential". *See generally* Project, *Governmental Information and the Rights of Citizens,* 73 Mich. L. Rev. 971, 1065-1067 (1975) ("Project").

---

[49] A controversy had arisen among some commentators as to whether the fourth exemption covered non-commercial or non-financial information. *Compare* A.G. Memorandum 32-34, *reprinted in* Source Book at 231-233, *with* Davis, Preliminary Analysis, 34 U. Chi. L. Rev. at 787-792. However, that controversy did not center upon the meaning of "commercial or financial information". *See* note 48, *supra.*

As to the second requisite, *i.e.*, that the information be "obtained from a person", the only problem area has been whether information obtained from governmental or personnel sources can be considered as having been "obtained from a person". *See* K. C. Davis, *Administrative Law Treatise, 1970 Supplement* § 3A.19 at 152-153 (1971).

Prior to the District of Columbia Circuit decision in *National Parks & Conservation Ass'n. v. Morton,* 498 F.2d 765 (D.C. Cir. 1974) (*"National Parks I"*), the most frequently articulated standard for construing the term "confidential" was that set forth in Senate Report No. 813: *i.e.,* information "which would customarily not be released to the public by the person from whom it was obtained." *See e.g., Sterling Drug Inc. v. F.T.C.,* 450 F.2d 698, 709 (D.C. Cir. 1971); *see also* Note, *The Freedom of Information Act: A Seven-Year Assessment,* 74 Colum. L. Rev. 895, 950-951 (1974) ("Note"). In adopting this test, such courts rejected the broader subjective interpretation of the exemption, supported by House Report No. 1497, that all information obtained from a private party who wishes the information be kept confidential would be considered "confidential" within the meaning of the exemption. *See e.g., Bristol-Myers Company v. F.T.C.,* 424 F.2d 935, 938-939 (D.C. Cir.), *cert. denied,* 400 U.S. 824 (1970).[50] Thus, most courts adopting the "not customarily disclosed" standard determined that the standard was objective rather than subjective. *See*

[50] Only one reported case has applied the broader subjective interpretation of the fourth exemption suggested in H. Rept. 1497, 89th Cong., 2nd Sess. 9 (1966). *Barceloneta Shoe Corp. v. Compton,* 271 F. Supp. 591, 594 (D. Puerto Rico 1967). The Ninth Circuit Court of Appeals, however, expressed its approval of the broader subjective test in *G.S.A. v. Benson,* 415 F.2d 878, 881 (9th Cir. 1969):

> "The district court concluded, however, 'that this exemption clearly condones withholding information only when it is obtained from a person outside the agency, and that person wishes the information to be kept confidential.' 289 F.Supp. at 594; and see citations therein. The district court further stated that 'the exemption is meant to protect *information that a private individual wishes to keep confidential for his own purposes, but reveals to the government under the express or implied promise by the government that the information will be kept confidential.' Id. This conclusion as to the meaning of 'confidentiality' seems correct.* See S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965)." (Emphasis added.)

e.g., Bristol-Myers Company v. F.T.C., supra, 424 F.2d at 938-939; *M. A. Schapiro & Co. v. S.E.C.,* 339 F. Supp. 467, 470-471 (D.D.C. 1972); *see also* Note, 74 Colum. L. Rev. at 951.

National Parks I was not a "reverse FOIA" case.[51] It involved a request by the National Parks and Conservation Association for documents from the National Park Service relating to concession arrangements with private concessioners. The request was denied by the government as to financial information submitted by the concessioners, and the Association sued to compel disclosure under the Act. The district court held that the financial information was "confidential" within the meaning of the fourth exemption, and therefore exempt from disclosure because it was of a kind "that would not generally be made available for public perusal." *National Parks & Conservation Ass'n v. Morton,* 351 F. Supp. 404, 407 (D.D.C. 1972).

The District of Columbia Court of Appeals in *National Parks I* began its analysis by recognizing that prior decisions in that Circuit had adopted the "not customarily disclosed" standard enunciated in Senate Report No. 813, and had determined that standard to be an objective one. *National Parks I, supra,* 498 F.2d at 766. Not satisfied that this standard was "justified by the legislative history" (despite its derivation from both the Senate and House Reports on the enacted bill), the court surveyed the legislative history and found that the exemption had a two-fold justification: "(1) encouraging cooperation by

[51] Litigation arising pursuant to the Freedom of Information Act has been in two forms. The usual case, expressly provided for in the Act, involves a party suing a government agency to obtain disclosure of requested information. The so-called "reverse FOIA" case, as the instant case, involves a party who has submitted the information to the government and subsequently sues the government to enjoin the disclosure of that information to a third party requester.

those who are not obliged to provide information to the government and (2) protecting the rights of those who must". *Id.* at 769. The court concluded that the "history firmly supports the inference that section 552(b)(4) is intended for the benefit of persons who supply information as well as the agencies who gather it"; and purporting to summarize its findings, the court fashioned the following test:

> "[C]ommercial or financial matter is 'confidential' for purposes of the exemption if disclosure of the information is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) *to cause substantial harm to the competitive position of the person from whom the information was obtained.*" (Emphasis added and footnote omitted.) *Id.* at 770.

The second element of this test, however, is a *non sequitur*. Although the possibility of competitive harm from disclosure was raised in the congressional hearings cited in the opinion, there is no support for the conclusion that competitive position was the *only* private business interest which the exemption was intended to protect.[52] On the contrary, the history cited also indi-

[52] As noted by Professor Kenneth Culp Davis in *Administrative Law of the Seventies*, § 3A.19, 91 (1976):

> "The definition [of confidential] based on competition seems obviously too narrow, because adequate reasons for confidentiality may have no relation to competition . . .".

The court in *National Parks I* utilized primarily the 1963 Senate Hearings on an initial version of the FOIA bill for support of its proposition that competitive harm resulting from disclosure was the primary reason for the fourth exemption. 498 F.2d at 768-769 ns. 5-10 and accompanying text. While those hearings do support the argument that competitive harm was one concern, they also support the broader concern for the preservation of traditional privacy rights with respect to private business information submitted to the government. *See* footnotes 17-22 and accompanying text, *supra*. The language of the fourth exemption created after the 1963 and 1964 Senate Hearings (*i.e.*, "trade secrets and other information customarily privileged and confidential") does not support the conclusion that preventing competitive harm was the dominant purpose behind the enactment of the fourth exemption.

cates the congressional intent to preserve the traditional *privacy* interests of business enterprises — whether or not competitive injury might result from disclosure.[53] The addition of the requirements of the *probability* and *substantiality* of the competitive harm resulting from disclosure is pure judicial legislation; not a shred of support for such a restrictive construction can be found in the language of the exemption, in its legislative history or, indeed, in the court's opinion.

The court of appeals in *National Parks I* remanded the the case to the district court for further proceedings on the competitive injury issue. 498 F.2d at 771.[54] After two days of full evidentiary hearings, the district court found that the government (with the assistance of the concessioners as intervenors) satisfied the burden of establishing that disclosure of most of the information at issue would be likely to cause the concessioners substantial competitive harm.[55]

The Association again appealed to the District of Columbia Circuit. In *National Parks & Conservation Ass'n. v. Kleppe*, 547 F.2d 673 (D.C. Cir. 1976) (*"National Parks II"*), the court reviewed the district court's appli-

[53] *See* Section I-A of this brief, *supra*. *Accord*, Patten and Weinstein, *Disclosure of Business Secrets Under the Freedom of Information Act: Suggested Limitations*, 29 Ad. L. Rev. 193, 197 (1977) (Patten & Weinstein); Project, 73 Mich. L. Rev. 1068.

[54] The Association objected to the need for such a remand, arguing that no showing of competitive injury was possible because the concessioners were statutory monopolists with no competition in their business operations or in the renewal of their contracts. Although the court found this argument "very compelling", it remanded the case to provide an opportunity for the agency to develop a fuller record on this issue. *National Parks I, supra*, 498 F.2d at 770.

[55] *See National Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673, 675 (D.C. Cir. 1976).

cation of the "competitive harm" test created in *National Parks I* and recognized the serious problems of proof engendered by that test. Rather than reconsidering the validity of the test, however, the court lowered the level of proof required to demonstrate competitive harm. *Id.* at 679-81. Specifically, the court held that the complex kinds of evidence on competitive harm associated with antitrust proceedings were not required to establish the applicability of the fourth exemption,[56] although it conceded that "[s]uch evidence would be relevant and material under the second prong of the *National Parks I* test." *Id.* at 680. The court observed that it was not "convinced of the feasibility and wisdom of imposing such a requirement in fourth exemption cases generally", *id.* at 681, noting that "the costs of obtaining such detailed economic evidence as appellant suggests should have been required of these concessioners *might well preclude a small business from ever seeking to prevent disclosure of its confidential commercial or financial information.*" (Emphasis added.) *Id.* at 681 n. 24.

The decision in *National Parks II* does little to lighten the burden created by the competitive harm test. In most circumstances, proof of the likelihood of competitive harm occasioned by disclosure of particular information will necessitate complex and detailed evidence even to establish the nature of the competitive milieu in which the submitter does business.[57] Thus, the conclusion of the court in *National Parks II* that the costs of obtaining detailed economic evidence might preclude a

[56] Examples suggested by the Association included, *inter alia*, surveys of concessioner's customers, demonstrating the cross-elasticity of demand between goods and services provided by concessioners and non-concessioners, marketing practice surveys, etc. *National Parks II, supra*, 547 F.2d at 679-680.

[57] It suffices here to state that most private submitters of information to the government (including *Amicus*) operate in a competitive environment which is poles apart from the quasi-monopoly position of the concessioners in *National Parks*.

private submitter from seeking to protect its interests under the fourth exemption is not avoided by lowering the degree of the required proof — particularly where the government chooses *not* to assert the fourth exemption or asserts the purported authority to disclose information notwithstanding its applicability.[58]

C. The "Competitive Harm" Test Fashioned by the Court in National Parks I Effectively Vitiates the Protective Purpose of the Fourth Exemption Without Promoting the Primary Disclosure Purpose of the Freedom of Information Act.

The principal purpose of the Freedom of Information Act is to provide public access to governmental, not private, information. *Westinghouse Electric Corp. v. Schlesinger, supra,* 542 F.2d at 1210 n. 64; *cf. N.L.R.B. v. Sears,* 421 U.S. 132, 143 n. 10 (1975) ("The Act is fundamentally designed to inform the public about agency

[58] It has been argued that the court in *National Parks II* lowered the test to the extent that competitive harm need not be proven at all but merely suggested. *See* Patten & Weinstein, 29 Ad. L. Rev. at 200-201. Indeed, the language of the opinion itself states that:

> "No actual adverse effect on competition need be shown, nor could it be, for the requested documents have not been released. The court need only exercise its judgment in view of the nature of the material sought and the competitive circumstances in which the concessioners do business, relying at least in part on relevant and credible opinion testimony." *National Parks II, supra,* 457 F.2d at 683.

However, the court has not really defined what level of evidence would be *sufficient* (though it suggests that expert testimony will be necessary). Given the difficulty of establishing even the "competitive circumstances" of the submitter, *National Parks II* does little to remedy the problem of proof created in *National Parks I*. For application of the test subsequent to *National Parks II, see Sears, Roebuck & Co. v. G.S.A.,* 553 F.2d 1378 (D.C. Cir.) *cert. denied,* 98 S. Ct. 74 (1977) (holding that summary judgment on the competitive harm issue was improper).

action and not to benefit private litigants.")[59] That purpose is directly served by narrowly construing those exemptions which are intended to protect *governmental* interests in non-disclosure; it is served only indirectly, and to a far lesser extent, by narrow construction of exemptions designed to protect the interests of *private* parties in nondisclosure.[60]

Moreover, the Act was expressly designed to preclude an assessment of the requester's need for the information, thereby precluding a balancing of that need against the interest of the party seeking to preserve the confidentiality of the information. Davis, Preliminary Analysis, 34 U. Chi. L. Rev. at 765-766.[61] This again is a disclosure-oriented approach designed to encourage the prompt release of governmental information to the public. When applied to private information, however, the

[59] The language of the Act itself reflects its primary purpose to expose agency operations to the public. The basic disclosure requirements of the Act are specifically and predominantly designed to inform the public about *agency* organization, rules of procedure, policies, rulings, opinions, orders, decisions, staff manuals, staff instructions, etc. 5 U.S.C. § 552(a)(1) and (a)(2). Section 552(a)(3) provides generally for disclosure of other "records" upon request. Although private information submitted to the government apparently falls within this latter category of agency "records", disclosure of such information is incidental to the primary thrust of the Act.

[60] As stated by one commentator, "[c]ourts have been slow to recognize that the public's interest in confining the breadth of the exemptions is not equally strong for all nine provisions." Note, *In Camera Inspections Under the Freedom of Information Act*, 41 U. Chi. L. Rev. 557, 564 n. 52 (1974).

> "[C]ertain exemptions protect information the revelation of which would not offer insights into the workings and policies of the agency. For example, applicants sometimes request information about particular third parties. Denials of such requests are inherently less likely to be tainted by motives of concealing the agency's own errors, and disclosure of the information is unlikely to provide data germane to the policies of the Act." *Id.* at 565-567.

[61] As Professor Davis observes, this provision is a "departure from the customary practices of normal people, who often disclose to those having a special reason for knowing and

inability to balance interests creates special problems: *i.e.*, the privacy and competitive interests of private business which the fourth exemption was intended to protect are, by their nature, especially vulnerable to the Act's failure to distinguish between the competitor, the intermeddler and the person with a legitimate need to know. Narrow construction of the fourth exemption therefore poses a peculiar threat to the specific interests protected by that exemption.[62]

Finally, this Court has recognized that the Act's exemptions "are plainly intended to set up *concrete, workable standards*" for determining whether particular information is exempt from disclosure. *E.P.A. v. Mink*, 410 U.S. 73, 79 (1973) (Emphasis added.) The competitive harm test of *National Parks I* is simply not a workable standard — particularly in view of the timing of agency responses to requests for information required under the Act, as amended.[63] If information from a private submitter is requested, no formal mechanism exists for the submitter to assert its interests under the fourth exemption; the Act does not even require *notice* to the submit-

> withhold from those who do not.... But under the Act, Uncle Sam's information is either made public or not made public. The Act never requires it to be protected from all except those who have a special need for it." Davis, Preliminary Analysis, 34 U. Chi. L. Rev. at 765.

[62] The increasing use (or abuse) of the Freedom of Information Act by private parties seeking inexpensive insights into the operations of their competitors or discovery for civil litigation underscores this dilemma. *See e.g.*, Shorr, *Telling Tales: How Law Is Being Used to Pry Business Secrets From Uncle Sam's Files*, Wall Street Journal, May 9, 1977, at 1; Lardner, *Use, Abuse of Freedom of Information Act*, Washington Post, July 27, 1976, at A 4.

[63] Initial agency decisions to disclose or withhold information must be made within 10 working days after receipt of a request under the Act. 5 U.S.C. § 552(a)(6)(A)(i) (1977). *See note* 8, *supra*. For a discussion of agency problems in meeting the time deadlines set forth in the Act in other contexts, *see Open America v. Watergate Special Prosecution Force*, 547 F.2d 605 (D.C. Cir. 1976); *Exner v. F.B.I.*, 542 F.2d 1121 (9th Cir. 1976).

ter when its commercial data has been requested.[64] Moreover, governmental agencies charged with processing requests for disclosure under the Act are, in the vast majority of cases, incapable of assessing the likelihood or degree of competitive harm to the submitter within the tight time frame allotted by the Act, and have little incentive to make the assessment.[65] Even assuming that the submitter were notified, it is difficult and expensive for the submitter to present the evidence necessary to make a showing of competitive harm. As a result, the only courses available to the private submitter are to undertake the enormous cost of litigation in federal court to restrain disclosure or to forego the protection intended by the Act.

Considering the Act as a whole, the restrictive competitive harm test of *National Parks I* effectively vitiates the fourth exemption's intended protection of private interests, and does so without materially enhancing the Act's primary purpose to promote disclosure of information on government operations. The test therefore

[64] The Attorney General recommended that, in certain circumstances, agencies should consult with submitters before determining whether requested information is within the fourth exemption, A. G. Memorandum at 34, and some agencies have promulgated regulations requiring notice to submitters prior to release of their information. *E.g.*, 43 C.F.R. § 2.13(h) (1977). Such notice is not, however, required by the Act.

[65] As recognized by the court in *Westinghouse Electric Corp., supra*, 542 F.2d at 1213:

> "... [T]here is always the real risk that the agency itself will be delinquent in asserting the rights of the private party. After all, it could not care less about protecting the competitive position of a supplier of information. That is no part of its responsibility. Neither does it have, as has already been observed, in most instances, sufficient knowledge to assert properly the private party's right to confidentiality. And it must not be forgotten that the protection of a competitive position is both a valuable and often complex matter, dependent upon full proof, and one 'basic to our free enterprise system'" (Footnote omitted.)

See also note 69 and accompanying text, *infra;* Patten & Weinstein, 20 Ad. L. Rev. at 203-204.

not only conflicts with the language and legislative history of the fourth exemption, it also effectively destroys the Act's intended accommodation of the public interest in disclosure of governmental information and the private interests in non-disclosure of confidential business information.

II

IF THE FOURTH EXEMPTION WERE PROPERLY INTERPRETED TO GIVE EFFECT TO ITS INTENDED PURPOSE AND SCOPE, EXTENSIVE DE NOVO JUDICIAL REVIEW OF AGENCY DETERMINATIONS TO DISCLOSE PRIVATE INFORMATION MAY NOT BE NECESSARY.

The impact of a proper determination of the purpose and scope of the fourth exemption upon the resolution of questions presented by petitioner in this case is most dramatic with respect to the question of the scope of judicial review. Even if judicial review of an agency decision to disclose private information were limited to the scope of review afforded by the APA,[66] Section 706 of the APA, 5 U.S.C. § 706, contemplates *de novo* review of agency action when the agency's fact-finding procedures in an adjudicatory action are inadequate. *Citizens*

[66] *Amicus* does not concede that the scope of review in such actions is limited by the APA. The submitter has a right to *de novo* review based upon implied causes of action to protect its rights under the Freedom of Information Act and 18 U.S.C. § 1905. *E.g., Westinghouse Electric Corp. v. Schlesinger, supra,* 542 F.2d at 1211; *Hughes Aircraft Company v. Schlesinger,* 384 F. Supp. 292 (C.D. Cal. 1974), *appeal pending,* No. 75-1064 (9th Cir.). The argument in the text is limited to discussion of judicial review under the APA, however, to demonstrate that extensive *de novo* review will be necessary – even under the APA standards – so long as the scope of the fourth exemption is improperly construed. Of course, the extent, complexity and cost of judicial resolution of a submitter's rights under the Freedom of Information Act and section 1905 also hinge on the determination of the scope of the fourth exemption.

to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415 (1971); *see also* 1 K. C. Davis, *Administrative Law Treatise*, § 7.02 at 412-415 (1958). If the fourth exemption were improperly construed to require a determination of the likelihood or degree of competitive harm occasioned by disclosure, the agency procedures for making such a determination under the Act are woefully inadequate.[67]

As previously indicated, the Act does not require notice to the private submitter of information that a request has been made, and the statutory time restraints preclude a rational assessment of the "competitive harm" issue.[68] Compounding these fundamental procedural deficiencies, the complexity of the factual determination of competitive harm is simply beyond the capacity of agency personnel charged with making disclosure decisions under the Act. The government itself, in its petition for the rehearing *en banc* of *National Parks I*, conceded its incapacity to make proper findings on the issue of competitive harm:

> ". . . [T]he government receives information of almost infinite variety from a multitude of firms and individuals engaged in business ventures of all types.

[67] Facts relating to the issue of competitive harm occasioned by disclosure are clearly "adjudicative facts" requiring an adjudicatory hearing. As stated by Professor Davis:

> "Facts pertaining to the parties and their businesses and activities, that is, adjudicative facts, are intrinsically the kind of facts that ordinarily ought not to be determined without giving the parties a chance to know and to meet any evidence that may be unfavorable to them, that is, without providing the parties an opportunity for trial. The reason is that the parties know more about the facts concerning themselves and their activities than anyone else is likely to know, and the parties are therefore in an especially good position to rubut or explain evidence that bears upon adjudicative facts." 1 K. C. Davis, *Administrative Law Treatise*, § 7.02 at 413 (1958).

[68] *See* notes 63-65, *supra*. The time restraints of the Act obviously preclude an evidentiary hearing on the competitive harm issue.

> *To require the government to demonstrate in each case that the particular information at issue, because of the peculiarities of a particular industry or profession, will in fact result in substantial competitive harm, is to impose an overwhelming, if not impossible burden. In view of the fact that the government is not likely to be intimately familiar with a particular business or occupation, there is a high risk that the government will fail to demonstrate that competitive harm is likely to result from disclosure in many cases, when, in fact, competitive harm would indeed result from disclosure.* To force the government to bear the burden of proving that disclosure will result in substantial competitive harm, is thus manifestly unfair to the many businesses and individuals who submit trade secrets, and commercial and financial information to the government in confidence." (Emphasis added.)[69]

If, on the other hand, the fourth exemption were properly construed as protecting all commercial information "which would customarily not be disclosed to the public" by the submitter, the procedures of the Act and the fact-finding capabilities of the agencies might be adequate to determine the applicability of the exemption. The objective test of "customarily not disclosed to the public" could be met, for example, by affidavit of the

[69] *National Parks & Conservation Association v. Morton*, D.C. Cir. No. 73-1033, Appellees' Petition for Rehearing and Suggestion of Rehearing *En Banc* at 6-7 (1974). *See also e.g.*, S.E.C. Release No. 33-5571, 40 Fed. Reg. 8797, 8799 (March 3, 1975):

> "The [Securities and Exchange] Commission regrets that in many cases the Commission will disclose records although persons who cooperated in its investigation would have reasonable grounds to object, either because of personal privacy or business secrecy considerations. But the stringent time requirements under the Freedom of Information Act, as amended, as well as the heavy financial and manpower burden that the Commission would be obliged to sustain if it were to attempt to examine each individual record for these purposes, will generally prevent the Commission from refusing to make disclosure on these bases."

submitter explaining the internal procedures adopted to limit dissemination of the information. Agencies themselves, in many cases, would have access to information regarding the confidential treatment of similar information by other submitters which itself would establish, objectively, that the information was not of a type customarily disclosed to the public. Under such circumstances, a private submitter challenging an agency determination to disclose information would not necessarily be entitled to *de novo* review under the APA.

In view of the obvious impact of a determination of the scope of the fourth exemption upon the question of *de novo* review under the APA, it is somewhat surprising that the courts and commentators have determined the latter question without considering the former.[70] One commentator, for example, (1) apparently assumed the propriety of the competitive harm test fashioned by the court in *National Parks I*,[71] (2) concluded that *de novo* review in actions brought by submitters was not required under the APA because, *inter alia*, submitters have not shown the inadequacy of FOIA fact-finding procedures;[72] and (3) at the same time observed that new legislation was necessary to provide procedures for a meaningful determination of the facts by the agency.[73] The apparent inconsistency of these positions can be reconciled by discarding the competitive harm test of *National Parks I* and returning to the definition of the fourth exemption established by Congress.

---

[70] *See* note 79, *infra*.

[71] Clement, *The Rights of Submitters to Prevent Agency Disclosure of Confidential Business Information: The Reverse Freedom of Information Act Lawsuit*, 55 Tex. L. Rev. 587, 594 n. 24 (1977).

[72] *Id.* at 629.

[73] *Id.* at 634-638. The suggested legislation includes provision for notice to the submitter, time for the submitter to present arguments, and opportunity to submit evidence at informal agency hearings.

III

IN LIGHT OF THE PURPOSE OF THE FOURTH EXEMPTION TO PROTECT PRIVATE (AS OPPOSED TO GOVERNMENTAL) INTERESTS, THE GOVERNMENT MAY NOT DISCLOSE INFORMATION WHICH FALLS WITHIN THAT EXEMPTION.

Congress enacted the fourth exemption to preserve the traditional privacy and competitive interests of private parties who submit information to the government; and, in so doing, determined that such private interests outweigh the general public interest in disclosure of information within that exemption.[74] The balance represented by the fourth exemption therefore constitutes the Congressional determination of the public interest.[75] Congress could not at the same time have intended to confer broad discretion upon government agencies to disclose information within the exemption based upon their own *ad hoc* determinations of the "public interest".

Authorities which support agency discretion to disclose information within the Act's exemptions generally overlook the fundamental difference between those exemptions designed to protect *governmental* interests in nondisclosure and those designed to protect *private* interests. *See e.g., Pennzoil Co. v. F.P.C.*, 534 F.2d 627 (5th Cir. 1976); *Charles River Park "A", Inc. v. H.U.D.*, 519 F.2d

---

[74] *See* Section I-A of this brief, *supra*.

[75] *See* Project, 73 Mich. L. Rev. at 1045-1046.

As stated in H. Rept. No. 1497, 89th Cong., 2d Sess. 6 (1966): "It is vital to our way of life to reach a workable balance between the right of the public to know and the need of the Government to keep information in confidence to the extent necessary without permitting indiscriminate secrecy. The right of the individual to be able to find out how his Government is operating can be just as important to him as his right to privacy and his right to confide in his Government. This bill strikes a balance considering all these interests."

935 (D.C. Cir. 1975).[76] Authorities which have denied agency discretion to disclose information within the fourth exemption have focused upon the nature of the interests Congress sought to protect by enacting that exemption. *Westinghouse Electric Corp. v. Schlesinger, supra,* 542 F.2d at 1197-1205; *Continental Oil Co. v. F.P.C.,* 519 F.2d 31, 35-36 (5th Cir. 1975), *cert. denied sub nom., Superior Oil Co. v. F.P.C.,* 425 U.S. 971 (1976); *but*

[76] The court of appeals in this case also held that the fourth exemption was permissive, despite its recognition "that disclosure of submitter information is qualitatively different from disclosure of data directly relating to government operations and that the interest in privacy appears stronger with respect to the former than the latter." *Chrysler Corporation v. Schlesinger, supra,* 565 F.2d at 1184. The Eighth Circuit followed the *Chrysler* decision on this issue without significant discussion. *General Dynamics Corp. v. Marshall,* 16 E.P.D. ¶8128 at 4594-4595 (8th Cir. 1978).

There is little in the legislative history *of the Act* which suggests the permissive nature of the exemptions, and the references which support such an interpretation refer generally to all exemptions. *See e.g.,* H. Rept. No. 1497, *supra* at 2, 6 (using the words "*may* be exempt" (emphasis added) and "permit nondisclosure"). Indeed, with respect to the fourth exemption, the legislative history supports the mandatory nature of the exemption. *See e.g.,* H. Rept. No. 1497, *supra,* at 10 ("This exemption would *assure* the confidentiality of information obtained by the Government. . . ." [Emphasis added.])

A 1972 House report reviewing compliance with the Act also contains references to the permissive nature of the exemptions generally without focusing upon the nature of the interests protected by the different exemptions. H. Rept. No. 92-1419, 92d Cong., 2d Sess. 7 (1972).

The references to the permissive nature of the exemptions in the legislative history of the 1974 amendments to the Act should be understood in the light of the specific exemptions then being scrutinized by Congress. The most controversial was the first exemption relating to information classified by the Executive as secret in the interest of national defense or foreign policy, and most comments regarding the permissive nature of the exemptions were made in the context of amending that exemption. *See e.g.,* S. Rept. No. 93-854, 93d Cong., 2d Sess. 6 (1974). Similarly, the language of this Court in *E.P.A. v. Mink,* 410 U.S. 73 (1973) suggesting that the exemptions to the Act are permissive should be read in the context of the particular exemption at issue in that case: *i.e.,* the first exemption which clearly protects governmental, not private interests.

see Pennzoil Co. v. F.P.C., supra, 534 F.2d at 632.[77] *Amicus* submits that although Congress may well have conferred discretion upon government agencies to waive their own rights in the interest of disclosure, Congress did not intend to permit such agencies to waive the rights of private submitters.

Moreover, if this Court should determine that the fourth exemption is permissive, the determination of the scope of the exemption will have an enormous impact upon the agencies' exercise of such discretion. If agencies are confronted with the impossible task of determining the applicability of the fourth exemption (which is necessary to determine whether they *must* disclose under the Act),[78] they are very likely to take the path of least resistance and release the information pursuant to their purported discretionary power to determine the public interest.[79]

[77] The Ninth Circuit Court of Appeals, upon consideration of the specific interests protected by the fourth exemption, found that the exemption was mandatory in *Union Oil Co. of California v. F.P.C.,* 542 F.2d 1036, 1044-1045 (9th Cir. 1976), stating:

> "While the literal language of § 552 lends itself to . . . [the interpretation that the fourth exemption is permissive], the Congressional purpose in enacting the exemption was 'to protect from disclosure certain information which is highly valuable to several important industries and which should be kept confidential when it is contained in government records.' Sen.Rep.No.248, 90th Cong., 1st Sess., p. 2 (1967).
>
> • • • •
>
> If businesses are entitled to such protection under the statute as a matter of right, that right must be upheld even in cases where the agency fails to assert it on behalf of the private suppliers of data."

On petition for rehearing, however, the Ninth Circuit withdrew the portion of its opinion on this issue as premature without expressing a view as to its validity. *Id.* at 1045.

[78] *See* note 69 and accompanying text, *supra.*

[79] The government's tendency to rely upon its purported discretionary power rather than confronting the competitive harm issue is demonstrated by the government's approach to litigating these "reverse FOIA" suits. In the case brought by *Amicus, Hughes Aircraft Co. v. Schlesinger,* 384 F. Supp. 292 (C.D.

Finally, if this Court should determine that agencies have discretion to release information within the fourth exemption, a determination of the scope of the exemption is necessary to determine whether the discretion was abused. *See e.g., Pennzoil Co. v. F.P.C., supra,* 534 F.2d at 630-631. Since Congress has determined that the interests of the supplier protected by the fourth exemption outweigh the general public interest in disclosure, any agency decision to disclose information within the exemption should be deemed an abuse of discretion unless justified by extraordinary circumstances.[80]

Cal. 1974), *appeal pending,* No. 75-1064 (9th Cir.), the government conceded on appeal that the district court erred in determining that the information at issue was not within the fourth exemption – preferring to rely on its purported discretionary power to disclose notwithstanding the exemption rather than confronting the question of the scope of the exemption. In the instant case, the government did not contest the finding of the district court regarding the applicability of the fourth exemption. It is largely because of the government's position in these cases that the scope of the fourth exemption has not yet been properly defined.

[80] One commentator has suggested a showing that the *requester's* purpose be of "extraordinary public benefit". Project, 73 Mich. L. Rev. at 1161. *Amicus* submits that no such showing could be made in the instant case. Public scrutiny of AAP's would impair rather than promote the effective implementation of affirmative action programs. The self-appraisal required in AAP's regarding utilization of minorities and females in the workforce is an empty endeavor unless it is frank and critical; and the confidentiality of such an endeavor is the only means to assure that it will be undertaken vigorously. *See e.g., Dickerson v. United States Steel Corp.,* 12 E.P.D. ¶ 11,095 (E.D.Pa. 1976); *Sanday v. Carnegie-Mellon University, 11* E.P.D. ¶ 10,659 (W.D.Pa. 1975). Moreover, the establishment of goals and timetables for the employment and promotion of minorities and females (as opposed to impermissible "quotas") is, if nothing else, a delicate and difficult undertaking – with enormous potential for creating misunderstanding and even conflict among employees. Dissemination of detailed AAP information to the contractor's employees and the public would inhibit that undertaking.

This is no assertion of bad faith. It is simply a recognition that meaningful efforts by government contractors to implement affirmative action programs, involving as they do the extremely sensitive line between "color and sex-blindness" in

IV

BECAUSE THE AGENCY REGULATIONS HEREIN WHICH PURPORT TO AUTHORIZE DISCLOSURE OF INFORMATION WITHIN THE FOURTH EXEMPTION ARE FUNDAMENTALLY INCONSISTENT WITH THE INTENDED PURPOSE AND SCOPE OF THAT EXEMPTION, THEY CANNOT HAVE THE FORCE AND EFFECT OF LAW, AND DISCLOSURE OF INFORMATION WITHIN THE FOURTH EXEMPTION PURSUANT TO SUCH REGULATIONS IS NOT PROPERLY "AUTHORIZED BY LAW" UNDER 18 U.S.C. 1905.

Section 1905 of Title 18 of the U.S. Code prohibits any governmental official or employee from disclosing a broad range of private commercial and financial information obtained from private parties unless such disclosure is "authorized by law."[81] The court of appeals in the instant case held that the "disclosure regulations" contained in 41 C.F.R. Part 60-40[82] constituted such

---

employment and "reverse discrimination", will be hampered by public disclosure of details of AAP's. Information taken out of context or only partially disclosed may provide grist for unfounded but costly private litigation. And goals too sharply set or problem areas too critically appraised might well leave a contractor open to such attack by "aggrieved parties" on both sides. *Cf. Weber v. Kaiser Aluminum & Chemical Corp.,* 563 F.2d 216 (5th Cir. 1977).

[81] Section 1905 prohibits government officers and employees from disclosing "to any extent not authorized by law":

". . . any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association . . . ."

[82] The disclosure regulations exempt from disclosure, in relevant part, only:

"(1) Those portions of affirmative action plans such as goals and timetables which would be confidential commercial or

"authorization by law" for the disclosure of the information here at issue and thereby rendered the section 1905 prohibition against disclosure inapplicable. *Chrysler Corporation, supra,* 565 F.2d at 1186-1188.

The court held that "[t]hough the OFCC[P] has no statutory enabling act, it is authorized to promulgate disclosure regulations under the so-called housekeeping statute, 5 U.S.C. § 301 . . ."[83] 565 F.2d at 1186. Since it found such authority for the promulgation of the disclosure regulations in section 301, the court did not decide whether such regulations could be deemed authorized by the Freedom of Information Act or by Executive Order 11246. *Id.* at 1188.

---

financial information because they indicate, and only to the extent that they indicate that a contractor plans major shifts or changes in his personnel requirements and he has not made this information available to the public . . . .

"(2) Those portions of affirmative action plans which constitute information on staffing patterns and pay scales but only to the extent that their release would injure the business or financial position of the contractor . . . ." 41 C.F.R. § 60-40.3(a).

The disclosure regulations further provide that even exempt information should be withheld only "if it is determined that the requested inspection or copying does not further the public interest and might impede the discharge of any of the functions of the OFCC or the Compliance Agencies." *Id.*

[83] Section 301 provides:

"The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public."

The court of appeals was incorrect in stating that *the OFCCP* is authorized to promulgate the disclosure regulations. Section 401 of Executive Order 11246, 30 Fed. Reg. 12319 (1965), as amended by Executive Order 11375, 32 Fed. Reg. 14303 (1967), authorizes the Secretary of Labor to delegate his authority to the OFCCP "*except authority to promulgate rules and regulations of a general nature.*" (Emphasis added.) The prefatory comments to the disclosure regulations in the Federal Register also state, directly contrary to the above provision, that "[t]hese rules are issued pursuant to the general rule-making authority *of the OFCC[P]* under Executive Order 11246, as

Amicus submits that to the extent the disclosure regulations deprive private parties of the degree of protection Congress intended to preserve in enacting the fourth exemption, none of these purported sources of authority can properly infuse such regulations with the force and effect of law. Whether the disclosure regulations are considered "legislative rules" issued pursuant to a grant of legislative power,[84] "interpretive rules"[85] or something in between, they cannot have the force of law if they are fundamentally inconsistent with the statute they purport to implement.[86]

---

amended by Executive Order 11375 and the authority *given to component units of the Department of Labor to issue supplementary regulations* governing the disclosure of particular or specific records which are in the custody of that departmental unit under 29 CFR 70.71." (Emphasis added.) 38 Fed. Reg. 3192-3193 (February 2, 1973). If these statements are taken at face value, the disclosure regulations are invalid.

[84] "Legislative rules" generally refer to rules issued pursuant to legislatively delegated power to make rules having the force of law. *See generally* 1 K. C. Davis, *Administrative Law Treatise* § 5.03 (1958); *see also e.g., Joseph v. United States Civil Service Commission,* 554 F.2d 1140, 1153 n. 24 (D.C. Cir. 1977).

[85] "Interpretive rules" or guidelines generally refer to rules which are not issued pursuant to legislatively delegated power to make rules with the force of law and which may or may not be entitled to deference by a court in determining the applicable law, depending upon their persuasive power. *See General Electric Co. v. Gilbert,* 429 U.S. 125, 141-142 (1976); *see generally* 1 K. C. Davis, *Administrative Law Treatise* § 5.03 (1958).

[86] As Professor Davis observed in his text:

"In the middle territory between the extremes, the key factor . . . is not presence or absence of delegated power to make rules having force of law, but it is judicial interpretation of the substantive meaning of the statute: When the court's own interpretation of the statute and legislative history leads it to the result provided for by the rule, the court will reach that result, and it need not decide whether the rule was within granted power, for the result is the same either way; similarly, if the court finds that the legislative materials call for a decision that is opposite to what the rule provides, the court need not decide whether the rule is legislative or interpretative, for it is invalid if it is legislative and superseded by the court's interpretation if it is interpretative." K. C. Davis, *Administrative Law Text* § 5.03 at 129 (3d ed. 1972).

The disclosure regulations are fundamentally inconsistent with the protective purposes of the fourth exemption in two respects. First, they purport to define the scope of the fourth exemption at least as restrictively as the court in *National Parks I* by exempting only *specified kinds of information*, the disclosure of which *would* injure the competitive position of the submitter.[87] Second, the disclosure regulations provide that such exempt information should be withheld only "if it is determined that the requested inspection or copying does not further the public interest and might impede the discharge of any of the functions of the OFCC or the Compliance Agencies."[88] To give such regulations the force and effect of law is effectively to nullify the congressional intent in enacting the fourth exemption and to confer legislative power upon the executive agencies.

In view of the fundamental inconsistency between the disclosure regulations and the statute they purport to implement, it is not surprising that the regulations are seriously deficient in other respects. The regulations were issued by publication in the Federal Register on January 23, 1973, expressly purporting, *inter alia*, to "implement 5 U.S.C. 552, the Freedom of Information Act . . . " 38 Fed. Reg. 3192, 3193 (February 2, 1973). They were issued without compliance with the "notice and comment" requirements of section 553 of the APA, 5 U.S.C. § 553, purportedly because they "relate solely to interpretive rules, general statements of policy, and to rules of agency procedure and practice."[89] *Id.* at 3193.

Although section 553 of the APA does not require adherence to its rule making procedures for the promulga-

[87] *See* note 82, *supra*.

[88] *Id.*

[89] To the extent that the disclosure regulations purport to define the substantive scope of the fourth exemption as applied to private employment data, they are neither "general statements of policy" nor "rules of agency procedure and practice".

tion of interpretive rules, statements of policy or rules of agency procedure and practice, it does require compliance for the promulgation of "legislative rules",[90] *Joseph v. United States Civil Service Commission*, 554 F.2d 1140, 1153-1154 (D.C. Cir. 1977), or the rule will be deemed invalid.[91] *See N.L.R.B. v. Wyman-Gordon Co.*, 394 U.S. 759, 763-766 (1969); *Pickus v. U.S. Board of Parole*, 507 F.2d 1107, 1114 (D.C. Cir. 1974). Because the disclosure regulations were not promulgated pursuant to the notice and comment requirements of section 553, they cannot be valid legislative rules.

On the other hand, if the disclosure regulations are merely interpretive rules, they do not have the force and effect of law. *Joseph v. United States Civil Service Commission, supra*, 554 F.2d at 1153-1154 ns. 24 and 26; *Gibson Wine Co., Inc. v. Snyder*, 194 F.2d 329, 331 (D.C. Cir. 1952); 3 Mezines, Stein and Gruff, *Administrative Law* § 18.02[5][b], 18-30 to 18-33 (1977). Interpretive rules are merely an agency's interpretation of a statute it is charged with implementing; such rules create no law and have no effect beyond that of the statute. *Pesikoff v. Secretary of Labor*, 501 F.2d 757, 763 n. 12

[90] 5 U.S.C. § 553(b)(B) provides that notice and hearing required by the APA is not applicable when the agency for good cause finds "that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." However, according to section 553(b)(B), such findings must be incorporated and a brief statement of the reasons made in the rule issued. No such findings have been incorporated in the disclosure regulations of 41 C.F.R. Part 60-40; nor is there any evidence of good cause to avoid the procedural requirements of section 553.

[91] *Amicus* does not suggest that the disclosure regulations could be valid legislative rules even if properly promulgated pursuant to the APA. Neither the Freedom of Information Act, the "housekeeping statute" (5 U.S.C. § 301), nor the Executive Order can reasonably be read as delegating (expressly or impliedly) the power to make substantive rules with the force of law regarding the disclosure of private business information, much less rules which contradict the provisions of the Freedom of Information Act.

(D.C. Cir.), *cert. denied,* 419 U.S. 1038 (1974); 1 K. C. Davis, *Administrative Law Treatise* § 5.03 (1958). It would therefore appear that disclosure pursuant to an interpretive rule cannot constitute disclosure "authorized by law" within the meaning of 18 U.S.C. § 1905.

Finally, interpretive rules are, in certain instances, deferred to by the courts because they constitute a "body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Skidmore v. Swift & Co.,* 323 U.S. 134, 140 (1944). However, such deference is warranted only where an interpretive rule demonstrates: "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Id.* at 140; *accord, General Electric Co. v. Gilbert,* 429 U.S. 125, 141-142 (1976).

The disclosure regulations do not hold up under these standards. With respect to the thoroughness of consideration, the failure to adhere to the formal notice and comment requirements precluded adequate consideration of the private interests protected by the fourth exemption. Although the APA does not require notice and comment procedures for interpretive rules and statements of policy, 5 U.S.C. § 553(b)(A), such procedures should have been followed in view of the enormous impact of the disclosure regulations upon the rights of private submitters of AAP information. *See generally* K. C. Davis, *Administrative Law of the Seventies* §§ 6.02-7 and 6.01-8 and cases cited therein (1976); *see also* Koch, *Public Procedures for the Promulgation of Interpretive Rules and General Statements of Policy,* 64 Geo. L. J. 1047, 1059 n. 24 (1976). Where such regulations purport to define the degree of protection to be afforded the privacy and competitive interests of private parties, fundamental fairness demands some degree of participation by the

private parties in their formulation. *Id.; see also Joseph v. United States Civil Service Commission, supra,* 554 F.2d at 1154 n. 26; *Pickus v. U.S. Board of Parole, supra,* 507 F.2d at 1112-1113. Regulations promulgated without such input are not entitled to deference by this Court.[92]

With respect to the validity of the reasoning, the most critical weakness of the disclosure regulations is their fundamental inconsistency with the Act they purport to implement.[93] To the extent such regulations improperly restrict the intended protective purpose of the fourth exemption, they are unreasonable and not entitled to deference by this Court.

For all of the foregoing reasons, the disclosure regulations cannot have the force and effect of law. Accordingly, disclosure of information of the kind described in 18 U.S.C. § 1905 pursuant to such regulations is not "authorized by law" within the meaning of that statute.

---

[92] The informal notice and comment procedure adopted for the disclosure regulations (allowing 45 days for comment on the regulations *after* they had been issued), 38 Fed. Reg. 3193 (February 2, 1973), is inadequate in view of the breadth and degree of impact upon private parties.

[93] Such regulations are also unreasonable (1) in relation to 18 U.S.C. § 1905, inasmuch as they purport to allow federal employees and officers to define or redefine the scope of their own permissible conduct under section 1905 in accordance with their perception of the "public interest"; and (2) in relation to section 709(e) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-8(e), inasmuch as they purport to authorize disclosure of the same (and similar) information as that prohibited from disclosure by the Equal Employment Opportunity Commission under section 709(e). *See Chamber of Commerce v. Legal Aid Society,* 423 U.S. 1309, 1310-1312 (1975) (Douglas, J., denying motion for a stay).

CONCLUSION

For the reasons set forth above, *Amicus* submits that the judgment of the court of appeals should be reversed insofar as it holds (1) that information within the fourth exemption to the Freedom of Information Act, 5 U.S.C. § 552(b)(4), may be released to the public by the government; and (2) that the disclosure regulations set forth in 41 C.F.R. Part 60-40 constitute "authorization by law" within the meaning of 18 U.S.C. § 1905.

In the process of ruling on these issues, the Court should confirm that the fourth exemption was intended by Congress to preserve the confidentiality of all information not customarily disclosed to the public by private submitters. The extent of judicial review should be defined by the Court to assure the effective preservation of the privacy and competitive interests which Congress intended to protect in enacting the fourth exemption.

DATED: June 2, 1978.

Respectfully submitted,

LATHAM & WATKINS
THOMAS L. PFISTER
GEORGE H. WU
555 South Flower Street
Los Angeles, California 90071

Supreme Court, U. S.
FILED
JUN 5 1978
MICHAEL RODAK, JR., CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1977

No. 77-922

CHRYSLER CORPORATION,
Petitioner,

vs.

HAROLD BROWN, et al.,
Respondents.

BRIEF OF STANDARD OIL COMPANY OF CALIFORNIA AS AMICUS CURIAE IN SUPPORT OF PETITIONER

GEORGE A. SEARS
C. DOUGLAS FLOYD
225 Bush Street
Mailing Address P.O. Box 7880
San Francisco, CA 94120
Attorneys for Standard Oil Company of California as Amicus Curiae

PILLSBURY, MADISON & SUTRO
225 Bush Street
Mailing Address P.O. Box 7880
San Francisco, CA 94120
Of Counsel

PERNAU-WALSH PRINTING CO. - 562 MISSION STREET - SAN FRANCISCO, CA 94105
A BOWNE COMPANY

Table of Contents

	Page
Preliminary statement	1
Interest of the amicus curiae	1
Summary of the argument	6
Argument	9
I. The decision below disregards the express purpose of Exemption 4 of the Freedom of Information Act to protect trade secrets and confidential business information	9
II. The Court of Appeals denied the intended effect of 18 U.S.C. § 1905	19
Conclusion	25

Table of Authorities

Cases	Pages
Amell v. United States, 384 U.S. 158	23
Brady v. Roosevelt S.S. Co., 317 U.S. 575	14
Charles River Park "A," Inc. v. Department of H. & U.D., 519 F.2d 935	18, 20, 21, 22
Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402	19
Cort v. Ash, 422 U.S. 66	8, 15
Federal Trade Commission v. Robert O. Anderson, et al., (D.C. Cir. No. 78-1032)	5
F.T.C. v. Atlantic Richfield Co., 567 F.2d 96	6
F.T.C. v. Texaco, Inc., 517 F.2d 137, reversed en banc, 555 F.2d 862, cert. denied, 431 U.S. 974	3
Georgia v. Rachel, 384 U.S. 780	24
Herd & Co. v. Krawill Machinery Corp., 359 U.S. 297	14

	Pages
Illinois Brick Co. v. Illinois, 431 U.S. 720	18
In Re FTC Corporate Patterns Report Litigation, 432 F.Supp. 291	2
Missouri Pacific Railway v. Nebraska, 164 U.S. 403	13
National Parks and Conservation Ass'n v. Morton, 498 F.2d 765	9, 13
NLRB v. Sears, Roebuck & Co., 421 U.S. 132	4, 7, 11
Penna. Coal Co. v. Mahon, 260 U.S. 393	13
Renegotiation Board v. Bannercraft Co., 415 U.S. 1	15
Robert O. Anderson, et al. v. Federal Trade Commission (D.D.C. Misc. No. 77-0161)	19
SDC Development Corp. v. Mathews, 542 F.2d 1116	7, 11
Shaw v. Railroad Co., 101 U.S. 557	14
Texas & Pac. Ry. v. Abilene Cotton Oil Co., 204 U.S. 426	14
The Conqueror, 166 U.S. 110	24
Thompson v. Consolidated Gas Co., 300 U.S. 55	12
Trade Comm'n v. A.P.W. Paper Co., 328 U.S. 193	23
Twenty per Cent. Cases, 87 U.S. 179	14
United States v. International Business Machines Corp., 67 F.R.D. 40	12
United States v. Johnson, 323 U.S. 273	14
United States v. Lacher, 134 U.S. 624	24
United States v. Rumely, 345 U.S. 41	14
U.S. v. General Motors Corp., 323 U.S. 373	13
Westinghouse Elec. Corp. v. Schlesinger, 542 F.2d 1190	passim
Whalen v. Roe, 429 U.S. 589	11, 20
Wyandotte Co. v. United States, 398 U.S. 191	8, 25

Statutes

Revenue Act of 1864, c. 173, § 38, 13 Stat. 223, 238	19, 23
Revised Statutes of 1873, § 3167	24
Revised Statutes of 1878, § 3165	24

Title 5, United States Code	
§ 301	8, 21, 22, 25
§ 552(a)(6)(A)(i)	18
§ 552(b)(4)	4
§ 552b	17
§ 552b(c)	17
§ 552b(d)(1)	17
§ 706(2)(A)	9, 15, 25
Title 15, United States Code	
§ 46(f)	19
Title 18, United States Code	
§ 1905	passim

Other Authorities

7 Congressional Record (1878) 4005-4006	24
H. Rept. No. 94-880, Part I, 94th Cong., 2d Sess. (1976), p. 23	21
H. Rept. No. 1497, 89th Cong., 2d Sess. (1966), pp. 2-6, 10	15, 20
S. Rept. No. 813, 89th Cong., 1st Sess. (1965), pp. 2-6	11, 15
Hearings on S. 1666, Subcomm. of Senate Comm. on the Judiciary, 89th Cong., 1st Sess. (1963), p. 199	10
16 C.F.R., § 4.11(a)(2)(iii)	3
43 Fed. Reg., Jan. 26, 1978, pp. 3571-3574	3
Davis, The Information Act: A Preliminary Analysis, 34 U. Chicago Law Review (1967) 761	14
2 Milgrim, Trade Secrets (1977) par. 7.08[1]	12

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1977

No. 77-922

CHRYSLER CORPORATION,
Petitioner,

VS.

HAROLD BROWN, et al.,
Respondents.

BRIEF OF STANDARD OIL COMPANY OF CALIFORNIA AS AMICUS CURIAE IN SUPPORT OF PETITIONER

PRELIMINARY STATEMENT

Pursuant to Rule 42(2) of the Rules of this Court, this *amicus curiae* brief in support of Petitioner is filed with the written consents of the Solicitor General and of the Petitioner, which are on file with the Clerk of this Court.

INTEREST OF THE AMICUS CURIAE

The interest of Standard Oil Company of California in the outcome of this case arises from two important

developments in its relationships with agencies of the Federal government.

The first has been the explosion of demands that the Company supply ever-increasing quantities of its private business information and documents to an ever-increasing number of Federal agencies. Enormous quantities of such private business documents have been demanded by the Federal Energy Administration and its successor, the Department of Energy, by the Federal Trade Commission under its Line of Business and Corporate Patterns Report programs[1], and by many other Federal agencies. Standard of California currently submits over 170 reports containing private data to Federal agencies. A summary of these reports is set forth in the Appendix.

In addition to such regular reporting requirements, the Company is engaged in extensive litigation with the Federal government, notably a massive antitrust proceeding, *In the Matter of Exxon, et al.,* FTC Docket No. 8934, in which the Federal Trade Commission charges eight major petroleum companies with having monopolized and maintained a noncompetitive market structure in the refining of crude oil. That proceeding commenced in July 1973. Although it is still the early stages of discovery, the respondents collectively have already produced several million pages of their private business documents and, if the action proceeds as FTC counsel have projected, respondents will be required to produce tens of millions of pages of their private documents.

[1]See *In Re FTC Corporate Patterns Report Litigation* (D.D.C. 1977) 432 F.Supp. 291, appeal pending (D.C. Cir. No. 77-1732).

The second major development has been the unprecedented unwillingness of certain Federal agencies to grant any adequate protection to the Company's private documents and information, even where they are exempt from disclosure under the Freedom of Information Act, and even where they are expressly protected from disclosure by statute. For example, the Federal Trade Commission's Rules of Practice now authorize its General Counsel "to release • • • [private] records exempt from mandatory disclosure under 5 U.S.C. § 552(b)" as an act of discretion, without the slightest mention of standards for such release (16 C.F.R. § 4.11(a)(2)(iii)). The Commission has exercised this purported discretionary power with little or no regard for a company's legitimate interest in maintaining the privacy of its business information (see *F.T.C.* v. *Texaco, Inc.* (D.C.Cir. 1975) 517 F.2d 137, reversed en banc (D.C.Cir. 1977) 555 F.2d 862, certiorari denied (1977) 431 U.S. 974). And the Commission has now proposed to amend its Rules of Practice expressly to incorporate its present practice of *refusing even to provide notice* to the supplying party of some such disclosures (43 Fed.Reg. (Jan. 26, 1978), pp. 3571-3574, proposed § 4.10b(a)(6)(ii)).

This recent disclosure practice by Federal agencies, not confined to the Federal Trade Commission, ostensibly has been based, in the words of the court of appeals in the instant case, on the "general philosophy" of full agency disclosure embodied in the Freedom of Information Act (565 F.2d 1185). But this "general philosophy" applies only to disclosure of *agency records* pertinent to *agency action;* it has no application to disclosure of *private*

documents pertinent to *private business affairs,* for at least three reasons.

1. Disclosure of private business information in no way serves the purposes of the Freedom of Information Act. This Court emphasized in *NLRB* v. *Sears, Roebuck & Co.* (1975) 421 U.S. 132, 143, n. 10: "The Act is fundamentally designed to inform the public about *agency action*" (emphasis supplied), and *not* about the conduct of private business. Private documents, particularly when submitted in response to a subpoena or other legal compulsion (whether they are confidential documents or nonconfidential but nevertheless private documents), are not "agency records" subject to release under the Act. They are *private* records which are not converted into agency records by their compulsory production to a Federal agency.

2. The Freedom of Information Act itself states in exemption 4 that it "does not apply" to "trade secrets and commercial or financial information obtained from a person and privileged or confidential" (5 U.S.C. § 552(b)(4)). As to such documents, the Act's "philosophy" is not "full agency disclosure," but instead it is specifically nondisclosure.

3. Private documents of "trade secret" or "confidential" business nature are protected from disclosure by a number of statutes, most notably by provisions of 18 U.S.C. § 1905. But despite the plain and mandatory terms of this criminal statute, the regulations of some Federal agencies and the decisions of some Federal courts have effectively deprived it of force. The decision of the court

of appeals in this case that a Federal agency has power to relieve itself of any obligation under 18 U.S.C. § 1905 by promulgating a regulation under a "general housekeeping" statute is a flagrant example.

Because of Federal agencies' unwillingness or inability to protect against the disclosure of its private business documents and information to its competitors, to its opponents in litigation and to others, Standard of California has been forced to resort to Federal courts with increasing frequency to protect its rights. One such case is *Federal Trade Commission* v. *Robert O. Anderson, et al.* (D.C.Cir. No. 78-1032) (appeal pending) in which Standard of California and other respondents in FTC Docket No. 8934, supra, are seeking assurance that the Federal Trade Commission will protect their private documents submitted in the course of discovery in that proceeding. The *Anderson* case is pending on appeal in the District of Columbia Circuit, and this Court's decision in the present case may be of major importance in that action and in other cases in which the Company is attempting to protect its private business information from improper disclosure.

Unwarranted government disclosure of a private company's proprietary data threatens to cause much more than competitive harm. In the *Anderson* case, supra, the Federal Trade Commission, under a construction of the Freedom of Information Act much the same as that of the court of appeals in this action, adopted a "protective order" which permits the release of private documents produced by Standard of California during discovery in

FTC Docket No. 8934 to the Company's opponents in other litigation in other forums, to which the Commission is not a party and in which it has no direct interest. The Commission's "protective order" does not even guarantee the Company *notice* prior to such release.

Entirely apart from proprietary and competitive considerations, such ex parte disclosures would deny Standard of California the basic fairness guaranteed by the Due Process Clause in cases to which it is a party. In similar circumstances in *F.T.C.* v. *Atlantic Richfield Co.* (D.C. Cir. 1977) 567 F.2d 96, the court of appeals recognized that the transfer without notice by the Federal Trade Commission of private documents and data from one proceeding to another "would appear to negate all the authority and responsibility" of the trial judge and "all the notice and opportunity to object" which is the purpose of adjudicative discovery procedures (567 F.2d 104). The court emphasized that "[t]his area of inquiry—one which deals with such basic notions as notice and opportunity to be heard—inherently raises questions relating to due process" (567 F.2d 103).

To protect its private documents, its proprietary and competitive interests, and its right to due process of law, Standard of California submits the present brief as *amicus curiae* in support of Petitioner.

SUMMARY OF THE ARGUMENT

The court of appeals disregarded the central purpose of exemption 4 of the Freedom of Information Act which,

as the hearings, reports and debates demonstrate, was to *protect* private business information from public disclosure (*Westinghouse Elec. Corp.* v. *Schlesinger* (4 Cir. 1975) 542 F.2d 1190, 1210-1211). The Freedom of Information Act was designed to inform the public about the workings of government, and not about the conduct of private business (*NLRB* v. *Sears, Roebuck & Co.* (1975) 421 U.S. 132, 143, n. 10; *SDC Development Corp.* v. *Mathews* (9 Cir. 1976) 542 F.2d 1116, 1118-1119). Private records covered by exemption 4 do not reveal the structure, operation or decision-making processes of the government. They are *private* records, and they do not become public records subject to disclosure under the Act simply by virtue of their compulsory production to a Federal agency. Contrary to the court of appeals' conclusion, disclosure of the *private* data and information protected by exemption 4 would do nothing to serve the purposes of the Freedom of Information Act.

To construe the Freedom of Information Act to permit disclosure of such private data would raise serious Constitutional questions under the Fifth Amendment, and would be contrary to long-standing common-law principles which protect private business information from public disclosure. Only the plainest statement of Congressional purpose, which is nonexistent, should persuade this Court to adopt such a construction.

The court of appeals was in error in concluding that an agency's disclosure of exemption 4 information can not be said to be arbitrary, capricious or unlawful if the agency offers any minimal explanation of why it believes such disclosure to be in the "public interest." Unlike the

Government in the Sunshine Act, the Freedom of Information Act contains no authorization to disclose exempt materials in the public interest. In enacting exemption 4, the Congress determined that the public interest lies in the protection of such private business information from public disclosure, both as a matter of fairness and as a matter of right. The agencies have no discretion to override that Congressional determination.

The court of appeals also disregarded the 110-year-old criminal prohibition against disclosure of trade secrets and other private business information embodied in 18 U.S.C. § 1905. The provision of section 1905 that disclosures are permitted when "authorized by law" obviously was not intended to empower an agency to override the long-standing substantive policy of that criminal statute under the ministerial authorization to make regulations regarding the "custody, use and preservation of its records" contained in 5 U.S.C. § 301. The holding of the court of appeals in this regard not only defies common sense, but is contrary to the clear legislative history both of 5 U.S.C. § 301 and of 18 U.S.C. § 1905. That history establishes that the "authorized by law" exception to 18 U.S.C. § 1905 is confined to *statutes* expressly authorizing disclosure.

This case is an obvious one for the implication of any civil remedy necessary to prevent public disclosure of the private information protected by exemption 4 of the Freedom of Information Act and by 18 U.S.C. § 1905 (*Cort* v. *Ash* (1975) 422 U.S. 66, 78; *Wyandotte Co.* v. *United States* (1967) 398 U.S. 191, 202; *Westinghouse Elec. Corp.* v. *Schlesinger* (4 Cir. 1976) 542 F.2d 1190,

1211). In addition, there is an express civil remedy under the Administrative Procedure Act (5 U.S.C. § 706(2)(A)). De novo review is essential because agency fact-finding procedures, restricted by the 10-day period for decision on the question of release provided by the Freedom of Information Act, are patently inadequate.

ARGUMENT

I. THE DECISION BELOW DISREGARDS THE EXPRESS PURPOSE OF EXEMPTION 4 OF THE FREEDOM OF INFORMATION ACT TO PROTECT TRADE SECRETS AND CONFIDENTIAL BUSINESS INFORMATION.

The basic error of the court of appeals was its disregard of the central purpose of exemption 4 to protect trade secrets and other confidential business information from public disclosure. The predecessor of the bill that became the Freedom of Information Act "contained no exemption for trade secrets or commercial or financial information" (*National Parks and Conservation Ass'n* v. *Morton* (D.C.Cir. 1974) 498 F.2d 765, 768). This omission was strongly criticized in the hearings on the bill. The Department of Justice endorsed the view that an "exemption for 'trade secrets' *would avert the danger that valuable business information would be made public by agencies which had obtained it*" (498 F.2d 768) (emphasis supplied). The Department emphasized that:

> "A second problem area lies in the large body of the Government's information involving private business data and trade secrets, the disclosure of which could severely damage individual enterprise and cause widespread disruption of the channels of commerce.
> • • •

> "• • • *Not only as a matter of fairness, but as a matter of right, and as a matter basic to our free enterprise system, private business information should be afforded appropriate protection, at least from competitors*" (Hearings on S. 1666, Subcomm. of Senate Comm. on the Judiciary, 89th Cong., 1st Sess. (1963), p. 199) (emphasis supplied).

Exemption 4 was intended to satisfy this requirement for protection, and the hearings, reports and debates demonstrate the congressional intent that private business information subject to exemption 4 should be *protected* from disclosure (*Westinghouse Elec. Corp.* v. *Schlesinger* (4 Cir. 1975) 542 F.2d 1190, 1210-1211).

The court of appeals in the instant case nevertheless concluded that the agency in question had "discretion" to release private data covered by exemption 4 because the Freedom of Information Act does not in explicit terms authorize a cause of action to prevent disclosure by the supplier of the data. The court asserted that to imply a cause of action to prevent disclosure of exempt materials "would be inconsistent with the basic purpose of the FOIA, which was not to afford confidentiality, but to overcome restrictive agency interpretations of the original public information section of the Administrative Procedure Act"; that the "general philosophy" of the Act is one of "full agency disclosure" to the general public; and that recognition of a cause of action to prevent disclosure of exempt private business data would be "inconsistent with that general philosophy" (565 F.2d 1185).

The premise of the court's decision is incorrect. The legislative history makes clear that the Act does *not*

incorporate any "general philosophy" of "full disclosure" of documents covered by exemption 4. The Act was expressly designed to *protect* such exempt documents from disclosure. By its determination to protect such documents the Congress recognized and followed the long-standing principle that *"the right to collect and use [private] data for public purposes is typically accompanied by a concomitant statutory or regulatory duty to avoid unwarranted disclosures"* (*Whalen* v. *Roe* (1977) 429 U.S. 589, 605) (emphasis supplied).

The purpose of the Act was to inform the public about the workings of the Federal government, in order to develop an informed citizenry (S.Rept. No. 813, 89th Cong., 1st Sess. (1965), pp. 2-3; *NLRB* v. *Sears, Roebuck & Co.* (1975) 421 U.S. 132, 143, n. 10). The Act was *not* designed to inform the public about the workings of private businesses. In *SDC Development Corp.* v. *Mathews* (9 Cir. 1976) 542 F.2d 1116, 1118-1119, the court of appeals recognized this fact in holding that a reference library compiled by the National Library of Medicine did not deal with the "structure, operation and decision-making procedure" of the agency and thus was not an "agency record" subject to disclosure under the Act:

> "The legislative reports • • • support the conclusion that the type of documents Congress was seeking to include in the public disclosure provision of the Freedom of Information Act were primarily those which dealt with the structure, operation, and decision-making procedure of the various governmental agencies" (542 F.2d 1119).

For this reason, it turns the basic thrust of the Freedom of Information Act upside-down to hold that private rec-

ords ipso facto become "agency records" subject to public disclosure merely because the agency has secured their possession. But even on the assumption such documents could in some cases properly be considered to be records of an agency, it is apparent that public disclosure of the private documents and information subject to exemption 4 would do nothing to serve the purposes of the Freedom of Information Act.

The history of exemption 4 reveals that the Congress was well aware that public disclosure of trade secrets and other proprietary business data could cause serious and entirely unwarranted harm to private business. Proprietary business information has traditionally received strong legal protection from disclosure under the common law because "to disclose the trade secret publicly is said to dedicate it to the world and to destroy the owner's proprietary control and the secret's property value" (*United States* v. *International Business Machines Corp.* (S.D.N.Y. 1975) 67 F.R.D. 40, 45). The decision of the court of appeals attributes to the Congress the intent to authorize Federal agencies and employees to make discretionary disclosures of valuable proprietary data in the face of the established common-law principle that "equity will protect against the unwarranted disclosure or use of a trade secret," a rule "'settled beyond peradventure'" (2 Milgrim, Trade Secrets (1977) par. 7.08[1]).

Discretionary disclosures of confidential business data by Federal agencies would also violate the constitutional rule that it is a denial of due process of law to take the valuable property of one person for the private use or benefit of another (*Thompson* v. *Consolidated Gas Co.*

(1937) 300 U.S. 55, 79-80; *Missouri Pacific Railway* v. *Nebraska* (1896) 164 U.S. 403, 417). And even if it be assumed that some "public purpose" could be discerned, such disclosures would be contrary to the Fifth Amendment's prohibition against taking private property for public use without just compensation (*U.S.* v. *General Motors Corp.* (1945) 323 U.S. 373, 378; *Penna. Coal Co.* v. *Mahon* (1922) 260 U.S. 393, 415-416).

Contrary to the suggestion of the court of appeals in the present case (565 F.2d 1193), these considerations of private and constitutional right are not premature at the present juncture simply because there has been no final decision to release the data. The congressional awareness that public disclosure of exemption 4 information "'could severely damage individual enterprise and cause widespread disruption of the channels of commerce,'" and that protection of such data was "'a matter basic to our free enterprise system'" (*National Parks and Conservation Ass'n* v. *Morton* (D.C.Cir. 1974) 498 F.2d 765, 769) is of fundamental significance and should inform this Court's construction of exemption 4. There is no basis for concluding that the Congress intended to leave Federal agencies with unbridled discretion to release private trade secrets and other proprietary information under the undefined "public interest" standard adopted by the court of appeals in this case (565 F.2d 1172, 1192). Only the plainest statement of congressional purpose (which is nonexistent, the plain statement of purpose being to the contrary) should persuade this Court to adopt a construction that not only is fraught with constitutional difficulties but is contrary to long-standing common-law principles that

protect against such disclosures. This Court has frequently emphasized that "construction should go in the direction of constitutional policy even though not commanded by it" (*United States* v. *Johnson* (1944) 323 U.S. 273, 276-277; *United States* v. *Rumely* (1953) 345 U.S. 41, 45-46; *Twenty per Cent. Cases* (1873) 87 U.S. 179, 187). It is equally true that the Act should not be construed as abrogating the settled common-law right to prevent disclosure of proprietary information unless that result is "imperatively required" (*Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.* (1907) 204 U.S. 426, 437; see *Herd & Co.* v. *Krawill Machinery Corp.* (1959) 359 U.S. 297, 304-305; *Brady* v. *Roosevelt S.S. Co.* (1943) 317 U.S. 575, 581; *Shaw* v. *Railroad Co.* (1879) 101 U.S. 557, 565).

The omission of an express cause of action in the supplier of the data to prevent disclosure, in an act which Professor Davis has characterized as a "shabby product" of draftsmanship,[2] is not surprising. The legislative history makes clear that prior to 1967, when the Act became law, Federal agencies had *not* adopted the practice of making trade secrets and other proprietary business information available to the public. The congressional reports emphasize that Federal agencies had interpreted section 3 of the Administrative Procedure Act as it then existed as a "withholding statute," not only as to private business information that *should* be maintained in confidence, but also as to information about the workings of government that *should not* be withheld from the public

[2]Davis, The Information Act: A Preliminary Analysis, 34 U.Chi.L.Rev. (1967) 761, 807.

(e.g., S.Rept. No. 813, 89th Cong., 1st Sess. (1965), pp. 3-6; H.Rept. No. 1497, 89th Cong., 2d Sess. (1966), pp. 2-6). The Freedom of Information Act was intended to overturn that interpretation as to agency records, but *not* as to private business documents covered by exemption 4.

As to private materials, the Congress intended to confirm and continue the prior agency practice of protecting such documents from public disclosure. Nor is there one word in the Act or in its legislative history that evidences any intention to preclude Article III courts from exercising their traditional equitable powers to assure that private information covered by exemption 4 would not be disclosed to the public. This case is an obvious one for the implication of a civil remedy necessary to prevent such improper disclosures because (1) the submitters of proprietary data are the intended special beneficiaries of the exemption, and (2) the legislative history supports such a remedy (see *Cort* v. *Ash* (1975) 422 U.S. 66, 78; *Renegotiation Board* v. *Bannercraft Co.* (1974) 415 U.S. 1, 19-20; *Westinghouse Elec. Corp.* v. *Schlesinger* (4 Cir. 1976) 542 F.2d 1190, 1211).

Moreover, the Administrative Procedure Act provides that a reviewing court "shall • • • hold unlawful and set aside" any agency action which is "arbitrary, capricious, or an abuse of discretion" (5 U.S.C. § 706(2)(A)). The court of appeals in this case incorrectly assumed that its role in reviewing an agency decision to disclose information covered by exemption 4 is limited to determining whether "the agency considered the proper factors in determining that disclosure was permitted under its own disclosure regulations" (565 F.2d 1192). The court dis-

regarded the fact that the agency's "disclosure regulations" were themselves inconsistent with the Freedom of Information Act and with its underlying legislative history; and the court apparently acted in the belief that an agency's action cannot be said to be an abuse of discretion if it offers any minimal explanation of why public disclosure of exempt information would be in the "public interest," a standard nowhere mentioned or defined in the Freedom of Information Act (565 F.2d 1192).

The basic fallacy of this approach is that the Congress, in exemption 4, *has already determined where the public interest lies.* The Congress has determined that proprietary material should *not* be disclosed to the public, as a matter of fairness and as a matter of right. As the court of appeals emphasized in *Westinghouse Elec. Corp.* v. *Schlesinger* (4 Cir. 1976) 542 F.2d 1190:

> "In enacting such exemption, the Congress had balanced the right to public disclosure against the right of the private party to protection and had opted for the right to privacy in favor of the private interest" (542 F.2d 1211).

There is thus no "discretion" in an agency to disclose exemption 4 materials according to the agency's view of the "public interest" because Congress has determined that the public interest is in protection of such materials. In this connection, as Petitioner has pointed out, there is a distinction between exemption 4, which was designed to protect *private* documents and interests, and other exemptions designed to protect *government* functions and interests. Even if an agency may waive a protection designed for its own benefit, there is no basis for concluding that

the Congress intended to empower an agency to waive a protection designed for private interests.

The Freedom of Information Act stands in marked contrast to the recently enacted Government in the Sunshine Act (5 U.S.C. § 552b), which expressly authorizes an agency to determine that certain of its meetings should be open to the public notwithstanding a potential for disclosure of information covered by some of the Act's exemptions, if the agency "finds that the public interest [so] requires" (5 U.S.C. § 552b(c)) under carefully defined procedures (5 U.S.C. § 552b(d)(1)). Even on the assumption that the Sunshine Act has authorized agencies to disclose exemption 4 materials at certain meetings in the "public interest," *there is no such authorization in the Freedom of Information Act.* In view of the constitutional and statutory questions such disclosures would raise, this Court should require an explicit statement of congressional intent before permitting Federal agencies to make discretionary disclosures of the immense quantities of proprietary data covered by exemption 4 of the Freedom of Information Act.

There is an obvious difference in the subject matter of the Sunshine Act and that of the Freedom of Information Act. The Sunshine Act requires the opening to the public of agency meetings that lie at the heart of government decision-making processes. Such meetings necessarily implicate the congressional concern of informing the public about *workings of the Government.* And agency meetings could not frequently be expected to disclose private business data in a way that would cause competitive harm. Exemption 4 of the Freedom of Information Act deals,

in contrast, with private business documents and information, disclosure of which could do nothing to inform the public about workings of the government, and which would cause competitive harm.[3]

On the remedial issue, as previously noted (supra, p. 15), it follows from the foregoing that a supplier of data has a cause of action under exemption 4 to protect the proprietary data that it has submitted, and to prevent release of the data in violation of law. As the court of appeals observed, the questions of statutory protection under exemption 4 and of a cause of action to prevent release are "interdependent" (565 F.2d 1185).[4]

[3]Proponents of the view that agencies have discretion to release exemption 4 materials have pointed to isolated remarks in congressional reports regarding *the 1974 amendments* to the Act (referring generally to the exemptions as permissive rather than mandatory). The 1974 amendments had nothing to do with either exemption 3 or exemption 4. Moreover, as this Court pointed out in *Illinois Brick Co.* v. *Illinois* (1977) 431 U.S. 720, 734, n. 14:

> "The views expressed by particular legislators as to the meaning of that language • • • 'cannot serve to change the legislative intent of Congress • • • "since the statements were [made] after passage of the • • • Act"'."

[4]As Petitioner has further pointed out, even if the Court were to decide that suppliers of data could not invoke the general equity powers of the Federal courts and that their only cause of action is under section 706 of the Administrative Procedure Act, it does not follow that the district court was precluded from making a de novo determination of the confidentiality of the material in question and the application of exemption 4, as two courts of appeal have held (*Westinghouse Elec. Corp.* v. *Schlesinger* (4 Cir. 1976) 542 F.2d 1190, 1213-1215; *Charles River Park "A," Inc.* v. *Department of H. & U. D.* (D.C.Cir. 1975) 519 F.2d 935, 940-941 and n. 4). The need for de novo review is patent in circumstances where the 10-day period provided in the Freedom of Information Act for agency decision on the question of release (5 U.S.C. § 552(a)(6)(A)(i)) is obviously inadequate for development of a full administrative record, and where it has been held that agency decision and release cannot be withheld pending administrative review (see the opinion below, 565 F.2d 1193). De novo review is contemplated under the Administrative Procedure Act where "agency fact finding procedures are inadequate" (*Citizens to Preserve Overton Park* v. *Volpe* (1971) 401 U.S. 402, 415).

II. THE COURT OF APPEALS DENIED THE INTENDED EFFECT OF 18 U.S.C. § 1905.

The court of appeals also erred in permitting a Federal agency to override an express statutory prohibition against disclosure of trade secrets and confidential business information. Standard of California confronted the same problem in *Robert O. Anderson, et al.* v. *Federal Trade Commission* (D.D.C. Misc. No. 77-0161), supra, p. 5, where the Federal Trade Commission cavalierly asserted in argument in the district court that it has the absolute and unbounded discretion to make public disclosures of the Company's private business documents, notwithstanding the criminal prohibition against such disclosures in 18 U.S.C. § 1905 (FTC Reply Mem. in Support of Petition, p. 24 and n. 36).[5]

Section 1905 traces its origin to an 1864 statute that forbade disclosure of confidential business information by Internal Revenue Service employees (Revenue Act of 1864, c. 173, § 38, 13 Stat. 223, 238). In 1940, Congress combined that statute and similar statutes applicable to other agencies in 18 U.S.C. § 1905, to establish a single prohibition applicable to all Federal agencies and employees. Section 1905 thus expresses a *110-year-old Federal*

[5]The Commission made that assertion in the face of the additional prohibition against disclosure of trade secrets and names of customers contained in the Commission's own enabling act (15 U.S.C. § 46(f)).

policy, which reflects the settled common-law and constitutional protection of trade secrets and, additionally, the principle recognized by this Court in *Whalen* v. *Roe* (1977) 429 U.S. 589, that "the right to collect and use [private] data for public purpose is typically accompanied by a concomitant statutory or regulatory duty to avoid unwarranted disclosures" (429 U.S. 605). And section 1905 *was undoubtedly the leading example* of the "nearly 100 statutes • • • which restrict public access to specific Government records" that the Congress had in mind in enacting exemption 3 of the Freedom of Information Act in an effort to ensure that "these [statutes] would *not* be modified" by the Act (H.Rept. No. 1497, 89th Cong., 2d Sess. (1966), p. 10 (emphasis supplied); see *Westinghouse Elec. Corp.* v. *Schlesinger* (4 Cir. 1976) 542 F.2d 1190, 1202).

In *Charles River Park "A", Inc.* v. *Department of H. & U.D.* (D.C.Cir. 1975) 519 F.2d 935, the question was whether the Freedom of Information Act was itself a statute "authorizing" disclosure of trade secrets and confidential business data within the meaning of section 1905's exception for disclosures "authorized by law." The court of appeals held that, inasmuch as the Freedom of Information Act "does not apply" to trade secrets and other confidential business information within exemption 4, that Act provides no authority to disclose such materials. Accordingly, the court held that an agency has no discretion to disclose trade secrets and other confidential business information covered by 18 U.S.C. § 1905, as long as that material also falls within the fourth exemption:

"If it does, it would be an abuse of discretion for [the agency] to release the information" (519 F.2d 943).[6]

By the 1976 Sunshine Act amendments to exemption 3, the Congress confirmed the essential holding of *Charles River Park* that at the very least, insofar as material within exemption 4 is also within 18 U.S.C. § 1905, the Freedom of Information Act *prohibits* its disclosure. Contrary to the holding of the court of appeals in this case, the agency has no discretion in the matter. The House Report on the Sunshine Act states that "if material is within the trade secrets exemption of the Freedom of Information Act" then "section 1905 must be considered to ascertain whether the agency is *forbidden* from disclosing the information. *See Charles River Park 'A', Inc.* v. *Dept. of Housing and Urban Development*, 519 F.2d 935, 941 n. 7 (D.C. Cir. 1975) and cases there cited" (House Committee on Government Operations, Rept. No. 94-880, Part I, 94th Cong., 2d Sess. (1976), p. 23) (emphasis supplied).

The provision of 18 U.S.C. § 1905 that disclosures are not prohibited when "authorized by law" obviously was not intended to permit an agency to override the long-standing substantive policy embodied in that criminal statute through a ministerial authorization to make regulations regarding the "custody, use and preservation of its records" in 5 U.S.C. § 301. There is nothing in the legislative history of section 301 that indicates that it is

---

[6]While the result was correct, the court's analysis was over-refined. The Freedom of Information Act was plainly intended to preserve 18 U.S.C. § 1905 in its entirety. But the question is academic since the coverage of 18 U.S.C. § 1905 is essentially coterminous with that of exemption 4.

in any way concerned with or addressed to the public disclosure of private business documents protected by other statutes, such as 18 U.S.C. § 1905. To the contrary, as the court of appeals correctly recognized in *Charles River Park "A", Inc.* v. *Department of H. & U.D.* (D.C. Cir. 1975) 519 F.2d 935, 942, that legislative history demonstrates that section 301 was not intended to override 18 U.S.C. § 1905:

> "In 1958 an amendment was added to section 301 which provided that the section 'does not authorize withholding information from the public or limiting the availability of records to the public.' However, the sponsor of the amendment, Congressman Moss, stated explicitly that the amendment did 'not affect the confidential status of information given to the government and carefully detailed in Title 18, United States Code, Section 1905.' 104 Cong. Rec. 6550 (1958)" (519 F.2d 942).

The court of appeals in this action, in disregard of that plain statement, adopted the tortured construction that, since the Congress by the 1958 amendment made clear that section 301 itself was not authority to *withhold* documents, section 301 should be construed as authority to *disclose* private business documents even though such disclosure is otherwise prohibited by 18 U.S.C. § 1905 (565 F.2d 1187). This is an obvious non sequitur. That section 301 itself confers no authority to withhold documents does not mean that it was intended to override the substantive policy of other Federal statutes that do require nondisclosure. It would be "an incredible rule" that a legislative prohibition, such as section 1905, could be overridden by the very executive agencies it was intended to restrain

by the agencies' merely invoking provisions of a "general housekeeping" statute (cf. *Westinghouse Elec. Corp.* v. *Schlesinger* (4 Cir. 1976) 542 F.2d 1190, 1215).[7]

The ruling of the court of appeals attributes to the Congress the implied intent to permit agencies to repeal the historic and specific prohibition of 18 U.S.C. § 1905, contrary to repeated decisions of this Court (*Amell* v. *United States* (1966) 384 U.S. 158, 165-166; *Trade Comm'n* v. *A.P.W. Paper Co.* (1946) 328 U.S. 193, 201-202). The constitutional problems that are raised by the public disclosure of proprietary information protected by 18 U.S.C. § 1905, together with basic considerations of private right and fairness, make it essential that the Court require a plain statutory statement of any intent to otherwise "authorize by law" the disclosure of such information (see the authorities cited, supra, p. 14).

The error of the court of appeals is further demonstrated by the history of 18 U.S.C. § 1905. The original 1864 statute, from which the present language was derived, prevented disclosures "in any manner *other than is provided in this act*" (13 Stat. 238) (emphasis supplied), thus clearly contemplating *statutory* authority for disclosure. The revisers without explanation changed this lan-

---

[7]The holding of the court of appeals that an agency housekeeping regulation can override a Federal criminal statute is all the more flagrant where "EEO-1" reports are involved. As the court acknowledged (565 F.2d 1178 and nn. 21, 22), that report must be filed not only with the Office of Federal Contract Compliance (OFCC), but also with the Equal Employment Opportunity Commission (EEOC). The EEOC is statutorily prohibited by the Civil Rights Act of 1964 from disclosing EEO-1 forms, and the court of appeals *still* allowed the OFCC by a housekeeping regulation to authorize disclosure of the same forms.

guage to "in any other manner than may be provided by law" in the preparation of the Revised Statutes of 1873, where it appeared as part of section 3167, and the authorized "by law" terminology was thereafter carried forward without change to become the "to any extent not authorized by law" exception to the current 18 U.S.C. § 1905. In light of this history, the present "authorized by law" language should be read as limited to the same type of authority for disclosure as the original law, namely, to *statutory* authority (*Georgia* v. *Rachel* (1966) 384 U.S. 780, 789-791; *The Conqueror* (1897) 166 U.S. 110, 121-125; *United States* v. *Lacher* (1890) 134 U.S. 624, 626-627).

This construction is also confirmed by the contemporaneous history of the second preceding section to section 3167 in the Revised Statutes of 1878. Section 3165 of the Revised Statutes authorized revenue officials to administer oaths in the performance of their duties where such oaths were "authorized by law to be taken." In 1878, the Congress concluded that this language was inadequate *because it did not permit oaths that were authorized by a valid regulation, but contemplated statutory authorizations only.* Accordingly, the Congress amended section 3165 to permit oaths "authorized by law or *regulation* authorized by law" (emphasis supplied). (The debates are at 7 Cong.Rec. (1878) 4005-4006.)

The holding of the court of appeals that any Federal agency can override the clearly expressed substantive policy of 18 U.S.C. § 1905 by a general housekeeping regulation is at war with the history and terms of 18 U.S.C. § 1905, of exemption 3 of the Freedom of Information Act and of 5 U.S.C. § 301, and it defies common sense. The "authorized by law" exception to section 1905 must be confined to *statutes* expressly authorizing such disclosures.

There is a civil cause of action to prevent disclosures prohibited by section 1905 both under *Wyandotte Co.* v. *United States* (1967) 389 U.S. 191, 202, and under the Administrative Procedure Act (5 U.S.C. § 706(2)(A)).

CONCLUSION

Prior to enactment of the Freedom of Information Act, there was no agency practice of disclosing private business data of the type covered by exemption 4. Such information was uniformly protected by Federal agencies.

The Congress had no intention of eliminating this salutary—indeed essential—protection in the Freedom of Information Act. It adopted exemption 4 to ensure that such protection would continue. Yet in the last 10 years, Federal agencies have turned the Act on its head by reading its policy of "full disclosure" of *agency* information to encompass the *private* business documents and data that the Congress intended to protect. Agency regulations now purport to authorize the disclosure of exempt private information in the unbounded discretion of the agency in defiance of the congressional balancing of the public and private interests that are involved.

This Court should reverse the decision of the court of appeals and affirm the balance that Congress established

by making clear that agencies have no discretion to release to the public the private documents and data in question.

Respectfully submitted,

GEORGE A. SEARS

C. DOUGLAS FLOYD

Attorneys for Standard Oil Company of California as Amicus Curiae

PILLSBURY, MADISON & SUTRO

Of Counsel

(Appendix Follows)

APPENDIX

Appendix

REPORTS SUBMITTED TO FEDERAL AGENCIES BY STANDARD OIL COMPANY OF CALIFORNIA

DEPARTMENT OF ENERGY

Form or Report No. and Title	Frequency
Form No. 1, "Complainants Report"	As Required
Form No. 15, "Supplier Certification of Unusual Growth Adjustment"	As Required
Form No. 15A, "Notification of Adjustment of Base Volume"	As Required
Form No. 17, "Request for Assignment of Supplier"	As Required
Form No. 18, "Base Supply Volume Report"	As Required
Form No. SG-1, "Survey of Gasoline Sales"	Monthly
Form No. 25, "Certification of Requirements"	Annually
Form No. 90, "Crude Petroleum Production"	Monthly
Form No. 92 and 92A, "No. 2 Heating Oil Price Adjustment"	Monthly
Form No. 100A, "Producers and Wholesalers Report For Propane and Butane"	Monthly
Form No. 101A, "Owners of Stored Product"	As Required
Form No. P101-Q-1, "Crude Oil Allocation Program"	Quarterly
Form No. P102-M-O, "Old Oil Entitlements Program"	Monthly
Form No. 103B, "Propane Storage Monthly Report"	Monthly
Form No. P103-M-O, "Old Oil Entitlements"	Monthly

Form or Report No. and Title	Frequency
Form No. P108-S-O, "Wholesale Purchaser—Resellers Certification"	Monthly
Form No. P109-S-O, "Surplus Propane/Butane Purchase Report"	As Required
Form No. P110-M-1, "Refiners Monthly Cost Allocation Report"	Monthly
Form No. P111-S-O, "Utility Supplier Questionnaire"	As Required
Form No. P113-M-O, "Report of Oil Imports"	Monthly
Form No. P114-M-O, "Monthly Remittance Advice"	Monthly
Form No. P116-S-O, "Request For Refund of Oil Import Fees"	As Required
Form No. P124-M-1, "Domestic Crude Oil Purchasers Report"	Monthly
Form No. P328-Q-O, "Foreign Crude Oil Cost Report"	Quarterly
Form No. P302-M-1, "Report For Product Prices"	Monthly
Form No. P304-M-O, "Monthly Survey Nonbranded Independent Marketers"	Monthly
Form No. P306-M-O, "Monthly Sales"	Monthly
Form No. P309-M-O, "Crude Oil Production Report"	Monthly
Form No. P310-M-O, "Receipts Report"	Monthly
Form No. P311-M-O, "Shipment Reports"	Monthly
Form No. P312-M-O, "Import Receipts Report"	Monthly
Form No. P313-M-O, "Port Movement Report"	Monthly

Form or Report No. and Title	Frequency
Form No. P314-M-O, "Survey of Distillate and Residual Fuel Oil Sales"	Monthly
Form No. P315-M-O, "Survey of Propane Sales"	Monthly
Form No. P320-M-O, "Refinery Report"	Monthly
Form No. P321-M-O, "Bulk Terminal Storage"	Monthly
Form No. P322-M-O, "Pipeline Products"	Monthly
Form No. P323-M-O, "Crude Oil Stocks"	Monthly
Form No. P328-Q-O, "Foreign Crude Oil Cost Report"	Quarterly
Form No. P324-A-O, "Financial Reporting Systems"	Annual
Form No. C-602-S-O, "Major Fuel Burnings/Installation Coal Conversion Report"	As Required
Form No. F701-M-O, "Transfer Pricing Report"	Monthly
Form No. 903, "Refiners Report of Buy/Sell Crude Oil Transactions"	Quarterly
Form No. 1,000, "Prime Suppliers Monthly Report"	Monthly
Form No. 1,001, "Refiners/Importers/Gas Processing Plant Operators Monthly Report"	Monthly
Form No. 1,007, "Report of Petroleum Shipments—Puerto Rico to U.S."	Monthly
Form No. P106-S-O, "Application to State For Petroleum Product Hardship or Emergency Relief"	As Required
Form No. P107-S-O, "State Office of Petroleum Allocation"	Reply to P106-S-O

Form or Report No. and Title	Frequency
Form U317-S-O, "Contract Utility Survey"	As Required
Form U318-M-O, "Underground Gas Storage Report"	Monthly
Form E1A-8, "Retail Motor Fuels Service Station Survey"	Monthly
Form E1A-9, "#2 Heating Oil Supply/Price Monitoring Report"	Monthly
Form E1A-49, "Domestic Crude Oil Entitlements Program—Refiners Report"	Monthly

BUREAU OF MINES

Form or Report No. and Title	Frequency
Form No. 6-1209A, "Production Estimate Sulfur, H_2S, Liquid Sulfur Dioxide"	Annual
Form No. 6-1237A, "Sulfur, H_2S, Liquid Sulfur Dioxide Production and Shipment"	Annual
Form No. 6-1238M, "Sulfur Purity 97% or Better"	Monthly
Form No. 6-1301A, "Shipment of Aviation Fuels"	Annual
Form No. 6-1302MS, "Bulk Terminal Stocks By Sulfur Content"	Monthly
Form No. 6-1305M, "Natural Gas Processing Plant Report"	Monthly
Form No. 6-1320M, "District 5 Petroleum Report Supplement"	Monthly
Form No. 6-1325T, "Crude Oil and Petroleum Product Pipeline Survey"	Annual
Form No. 6-1326A, "Value of Crude Oil Purchase At Wells"	Annual
Form No. 6-1329A, "Shipment of Asphalts and Road Oils"	Annual
Form No. 6-1334A, "Refinery Capacity Report"	Annual
Form No. 6-1335A, "Fuel Consumed For All Purposes"	Annual
Form No. 6-1336A, "Production of Other Finished Products"	Annual
Form No. 6-1337A, "Fuel Oil/Kerosene Sales and Shipments"	Annual
Form No. 6-1341A, "Supply and Disposition of Natural Gas"	Annual
Form No. 6-1343A, "Natural Gas Processing Report"	Annual
Form No. 6-1345A, "Shipment of LPG"	Annual

UNITED STATES GEOLOGICAL SURVEY

Form or Report No. and Title	Frequency
"Letter Reports: To Regional Supervisors U.S.G.S. Filing Requests For Approval To Dispose of Crude Oil Production From Leases on Public Domain Lands and Acquired Lands of the United States"	When Requested
"Middle Dome Production Report on Lessees Operation"	Monthly
Report No. 9-152, "Monthly Statements of Operations Listed By Lease Source and Disposition of Gas and Products"	Monthly
Report No. 9-153, "(Gas) Lessee's Monthly Estimated Report of Sales and Royalty Gas"	OCS — Operations
Report No. 9-153, "(Gas) Lessee's Monthly Report of Actual Sales and Royalties"	OCS — Operations
Report No. 9-329, "Lessee's Monthly Report of Oil, Water and Gas Production By State, Field, Lease and Well"	Monthly
Report No. 330, 331, 331C, "Notice of Intent and Subsequent Report on Drilling Work on Wells"	As Required
Report No. 9-361 (Oil), "Lessee's Monthly Report of Sales and Royalty"	Monthly
Report No. 9-361 (Gas), "Lessee's Monthly Report of Sales and Royalty"	Monthly
"Plans of Development For Fields On Federal Land" (A report to cover each field)	Annual

Form or Report No. and Title	Frequency
Affidavit, "Notice of Intention to Drill"	As Required
Affidavit, "U.S. Oil and Gas Lease Options"	Semi-annually
Affidavit, "U.S. Oil and Gas Lease Acreage"	As Requested
Affidavit, "Reduced Lease Acreage"	As Requested
Affidavit, "Plan of Operation"	As Requested
"Meter Calibration Reports"	Monthly

FEDERAL POWER COMMISSION

Form or Report No. and Title	Frequency
Report No. 4, "Power Plant Report"	Monthly
Report No. 2, "Annual Report of Corporate Information and Summary of Financial Statements"	Annual
Report No. 15, "Natural Gas Company Annual Report of Gas Supply"	Annual
Report No. 40, "Annual Report of Proven Domestic Gas Reserves"	Annual
Report No. 45, "Report of Nonjurisdictional Sales of Natural Gas By Companies to OFFPC Jurisdiction"	Annual
Report No. 64, "Report of Producers' Expenditures"	Annual
Report No. 69, "Alternative Fuel Demand Due to Natural Gas Curtailment"	Semi-annual
Report No. 108, "Sales By Other Parties Under Chevron's Rate Schedule; Recoverable Reserves; Identification of All Fields and Reservoirs Under Each Rate Schedule"	Semi-annual
Report No. 301, "A & B Independent Producers' Report"	Annual
"Annual Cost Data—Flowing Gas"	Two Year
"Rate Schedule Filing"	As Rates Change

INTERSTATE COMMERCE COMMISSION

Form or Report No. and Title	Frequency
Report No. ACV-1-2-3-4, "Report of Property Change"	Annual
Report No. ACV-8 & 9, "Report of Equipment and Tanks Purchased"	Annual
Report No. ACV-11, "Working Capital"	Annual
Report No. ACR-41, "Plant and Equipment Expenditure Survey"	Annual
"Transportation Revenue and Volumes"	Quarterly
"Application For Annual Evaluation"	Annual
"Pipeline Evaluation"	Annual
"Pipeline Capacities"	Semi-annual

BUREAU OF CENSUS

Form or Report No. and Title	Frequency
Report No. MQ-1, "Inventory and Sales Data"	Quarterly
Report No. M3, "Manufacturing Plant Shipments and Inventories"	Monthly
Report No. MQ-C1, "Plant Capacity"	Annual
Report No. MA-13K, "Annual Survey of Oil and Gas"	Annual
Report No. MA-13k (c), "Annual Survey of Oil and Gas, Oil Lease Data"	Annual
Report No. MA-29C, "Sales of Lube and Industrial Oils"	Annual
Report No. MA-100, MA-100SUPP, MA-153, "Annual Survey of Manufacturers"	Annual
Report No. MA-175, "Reports of Shipments For Federal Government Agencies"	Annual
Report No. MA-200, "Survey of Pollution Abatement Cost"	Annual
Report No. NC-X6, "Five Year Census of Business Manufacturing and Mineral Industries"	Five Years
Report No. MCD-13A, "Water Use in Manufacturing"	Two Years
Report No. MC-13A, MC-13B, NCK-13, NCX-1A, "Census of Mineral Industry"	Four Years
Report No. MA-28EL, "Shipment and Production of Inorganic Chemicals"	Annual
Report No. MA-28D, "Shipment and Production of Sulfuric Acid"	Annual
Report No. MA-28E2, "Shipment and Production of Industrial Gases"	Annual

Form or Report No. and Title	Frequency
Report No. BUS-224, "Retail Trade Report"	Annual
Report No. BUS-67, "Current Sales and Credit Report"	Monthly
Report No. TC-400-7 (TC-401), "Census of Transportation"	Four Years
Report No. MC-D-13A, "Refinery Stock Records"	Two Years
Report No. MC-13K, "Census of Mineral Industry"	Five Years
Report No. 333, "Sales and Service From Co-op Stations"	Monthly

BUREAU OF ECONOMIC ANALYSIS

Form or Report No. and Title	Frequency
Report No. BE-10, "Bench Mark Survey"	Five Years
Report No. BE-30, "Ocean Freight Revenues and Expenses"	Annual
Report No. BE-93, "International Transactions In Royalties, Licensing Fees, Management Fees, Etc."	Annual
Report No. BE-133, "Source and Application of Funds of U.S. Direct Investment Abroad"	Annual
Report No. BE-133B, "Follow-up of Property Plant and Equipment Expenditures"	Annual
Report No. BE-133C, "Schedule of Expenditures For Plant and Equipment"	Annual
Report No. BE-452, or 52P, or 52S, "Capital Expenditure and Sales"	Quarterly
Report No. BE-452A, "Capital Expenditures and Sales In Pollution Abatement Expenditures"	Annual
Report No. BE-577, "Transactions With Foreign Subsidiaries or Affiliate Corporations"	Quarterly
Report No. BE-577A, "Transactions With Associated Foreign Enterprises"	Annual
Report No. BE-577S, "Transactions of Primary Foreign With Secondary Foreign Corporations"	Annual
Report No. BE-578, "Operations of Foreign Branches of U.S. Reporters"	Quarterly
Report No. BE-578 (P), "Domestic Trading Losses Relating to Crude Oil Produced By Foreign Affiliates"	Quarterly

Form or Report No. and Title	Frequency
Report No. CIR-1, "Sulfuric Acid Production"	Monthly
Report No. DIB-622P, "Application For Export License"	Monthly
Report No. DIB-623P, "Application For Processing Card"	Monthly
Report No. DIB-628, "Export License"	Monthly
Report No. FC-3 (Monthly), FC-3A (Quarterly) "Reports of Assets, Liabilities and Positions In Foreign Currencies"	Monthly
Report No. FC-4, "Consolidated Report of Assets, Liabilities In Positions In Currencies of Foreign Branches in Subsidiaries"	Quarterly
Report No. 6-4, "Extension of Credit For Crude Purchase"	Quarterly

DEPARTMENT OF LABOR

Form or Report No. and Title	Frequency
"Specification For Wholesale Price Index"	Monthly
EEO-1 Form 100, "Statistics on Minority and Female Employment"	Annual
Affirmative Action "Report and Data on Various Types of Employees in Various Job and Salary Levels"	Annual
Affirmative Action "Report on Employed Handicapped"	Annual
Affirmative Action "Report on Employed Veterans"	Annual
"Response to Charge of Discrimination"	When Requested

DEPARTMENT OF TRANSPORTATION

Form or Report No. and Title	Frequency
Report No. 71002-1, "Description of Pipe, Number of Miles, Size, Location and Frequency of Inspection of Transmission and Gathering Systems"	Annual
F5800.1, "Hazardous Materials Incident Report"	As Required
MCS-50-T, "Accident Report"	As Required

BUREAU OF CUSTOMS

Form or Report No. and Title	Frequency
3299 "Declaration for Free Entry of Articles Not Accompanying a Resident"	All Items
3111 "Declaration for Free Entry of Returned American Products"	All Items
3351 "Release for Unaccompanied Tourist Shipment"	All Items
3581 "Proprietor's Warehouse Bond"	Annual
CF-3588 "Private Carrier Bond"	Annual
3855 "Bond of Customs' Cartmen or Lightermen"	Annual
5291 "Treasury Power of Attorney"	Annual
7501-A "Consumption Entry"	All Items
7502 "Warehouse or Re-Warehouse Entry"	All Items
7502-A "Warehouse or Re-Warehouse Entry"	All Items
7505-A "Warehouse Withdrawal for Consumption"	All Items
7506 "Warehouse Withdrawal Conditionally Free of Duty and Permit"	All Items
7511-A "Notice of Exportation of Articles With Benefit of Drawback"	All Items
7512 "Transportation Entry and Manifest of Goods Subject to Customs, Inspection and Permit"	All Items
7525 "Schedule B, Shipper's Export Declaration"	All Items
7529 "Carrier Certificate and Release Order"	All Items
7551 "Immediate Delivery and Consumption Entry Bond"	All Items
7555 "Warehouse Entry Bond"	All Items

FEDERAL TRADE COMMISSION

Form or Report No. and Title	Frequency
LB II A&B "Line of Business Report"	Annual
LB III A, A-1, B, C Financial Data "Line of Business Report"	Annual
MG "Income Statement and Balance Sheet"	Quarterly
CPR-1 "Corporate Patterns Report"	Annual
"Pre-Merger Notification"	Annual
NB-1 "Nature of Business Report"	On Request

Supreme Court, U. S.
FILED
JUN 5 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-922

CHRYSLER CORPORATION, *Petitioner*

v.

HAROLD BROWN, et al., *Respondents*

On Writ of Certiorari to the Court of Appeals for the Third Circuit

---

BRIEF AMICUS CURIAE ASSOCIATION OF AMERICAN MEDICAL COLLEGES

JOSEPH A. KEYES, JR.
Suite 200
One Dupont Circle, N.W.
Washington, D.C. 20036
Attorney for Amicus Curiae

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	1
CONSENT TO FILE	1
INTEREST OF THE AMICUS CURIAE	2
QUESTIONS PRESENTED	3
SUMMARY OF THE ARGUMENT	4
ARGUMENT	5
I. An Investigator's Ideas and Creative Work Are Valuable	5
II. An Investigator's Ideas, Properly Handled, May be Transformed Into Commercially Valuable Property	7
III. Exemption 4 of the FOIA is of Crucial Significance in the Protection of an Investigator's Ideas	8
IV. Harm to the Public Interest Results from Current Unpredictability of Protection from Disclosure	17
V. The FOIA Must be Interpreted Consistent with Relevant Constitutional and Statutory Provisions and with the Public Interest	20
CONCLUSION	21
APPENDIX A	1a
APPENDIX B	4a

TABLE OF AUTHORITIES

CASES:	Page
Ex Parte Hershberger, 96 U.S.P.Q. 54 (Bd. App. 1952)	8
Gulliksen v. *Halberg*, 75 U.S.P.Q. 252 (Bd. App. 1937)	8
Hamilton Laboratories v. *Massengill*, 111 F. 2d 584, 45 U.S.P.Q. 594 (6th Cir. 1940)	8
Indiana General Corp. v. *Lockheed Aircraft Corp.*, 249 F. Supp. 809, 148 U.S.P.Q. 312 (S.D. Cal. 1966)	8
Keewanee Oil Co. v. *Bicron Corp.*, 416 U.S. 470 (1970)	13
National Parks and Conservation Association v. *Morton*, 498 F. 2d 765 (D.C. Cir. 1974)	13, 14, 15
Petkas v. *Staats*, 501 F. 2d 887 (D.C. Cir. 1974)	14
Sears v. *Gottschalk*, 357 F. Supp. 1327 (E.D. Va. 1973), aff'd. 502 F. 2d 122 (4th Cir. 1974)	13
Washington Research Project, Inc. v. *Weinberger*, 504 F. 2d 238 (D.C. Cir. 1974), cert. denied, 421 U.S. 963 (1975)	10, 12, 15

CONSTITUTIONAL AND STATUTORY PROVISIONS:	
United States Constitution, Article I, Section 8, Paragraph 8	20
United States Constitution, Amendment V	20
5 U.S.C. 301	3
5 U.S.C. 552 (Freedom of Information Act)	3
5 U.S.C. 552 (b)(4)	Passim
18 U.S.C. 1905	Passim
42 U.S.C. 241	6
42 U.S.C. 241 (c)	6
86 Stat. 770 (Federal Advisory Committee Act)	3

OTHER AUTHORITIES:	
Basic Data Relating to the National Institutes of Health, DHEW Publication No. (NIH) 77-1261, 1977	2, 6
Government Accounting Office, "Problem Areas Affecting Usefulness of Results of Government-Sponsored Research in Medicinal Chemistry," GAO Report No. B-164031 (2) (1968)	18

Page

Hearings on the Business Record Exemption of the Freedom of Information Act before a Subcommittee of the House Committee on Government Operations, 95th Cong., 1st Sess. (1977), page 321 10

Letter to Heads of all Federal Departments and Agencies *re*: "Freedom of Information Act," dated May 5, 1977, from Griffin B. Bell, Attorney General 16

National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research, "Disclosure of Research Information Under the Freedom of Information Act," DHEW Publication No. (OS) 77-003 (1977) 21

Report of the President's Biomedical Research Panel, "Disclosure of Research Information," DHEW Publication No. (OS) 76-513 (June 30, 1976) ..7, 19, 21

Wade, "Peer Review System: How to Hand out Money Fairly," 179 *Science* (No. 4069) 158, 159 (1973) .. 5

Watson, "The Sharing of Unpublished Information," second Frank Nelson Doubleday Lecture for 1973-74, at the National Museum of History and Technology, January 29, 1974 .....9, 10

121 Cong. Rec. H 12379 (1975) 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-922

CHRYSLER CORPORATION, *Petitioner*

v.

HAROLD BROWN, et al., *Respondents*

On Writ of Certiorari to the Court of Appeals for the Third Circuit

---

BRIEF AMICUS CURIAE ASSOCIATION OF AMERICAN MEDICAL COLLEGES

OPINIONS BELOW

The opinion of the court of appeals is reprinted as Appendix A to the Petition for a Writ of Certiorari. The opinion of the district court is reported at 412 F. Supp. 171.

JURISDICTION

The jurisdiction of this Court rests on 28 U.S.C. § 1254 (1).

CONSENT TO FILE*

This Amicus Curiae brief is being filed with the consent of all the parties to the proceeding.

---

* Letters of consent of all parties to the case have been filed with the Clerk of the Court.

INTEREST OF AMICUS

The Association of American Medical Colleges is a voluntary, nonprofit, non-governmental corporation established under the laws of the State of Illinois, having its principal place of business in the District of Columbia. Its corporate purpose is the advancement of medical education. Its institutional membership includes all one hundred twenty one accredited and operating nonprofit medical schools and medical colleges in the United States. Its membership also includes over 400 teaching hospitals in which undergraduate and graduate medical education is conducted, and 63 academic and professional societies, the members of which are actively engaged in medical education and the conduct of biomedical research.

The members of the Association of American Medical Colleges (AAMC) conduct a substantial proportion of the nation's Federally supported biomedical research. Health related research and development is in large measure supported by the Federal Government; it provided nearly $2.8 billion for this purpose in 1975 out of a total national investment of more than $4.6 billion. Of this, $1.74 billion was expended in institutions of higher education. The National Institutes of Health, chief sponsor of medical research and development awarded $1.07 billion in Federal research grants and contracts to institutions of higher education of which $808 million was awarded to medical school members of the Association of American Medical Colleges and an additional $24.5 million to member hospitals.[1]

[1] Figures taken from Tables 2 and 21, Basic Data Relating to the National Institutes of Health, DHEW Publication No. (NIH) 77-1261, 1977.

Thus the institutions represented by *amicus* have a major role in the nation's system for conducting Federally sponsored research. Its interest in this case stems from the impact of the operation of the Freedom of Information Act (FOIA)[2] and the Federal Advisory Committee Act (FACA)[3] on that system. *Amicus* believes that a measure of confidentiality is a necessary feature of governmental review, evaluation and handling of research grant applications. Protection from premature disclosure of an investigator's ideas is necessary to assure that the full fruits of government funded research are available to the public and are essential to the preservation of important intellectual property rights.

QUESTIONS PRESENTED

The questions before the Court include whether Exemption 4 of the FOIA is permissive or mandatory; whether agency regulations promulgated pursuant to 5 U.S.C. § 301 constitute "authorization by law" within the meaning of 18 U.S.C. § 1905 for disclosure of private, confidential business information; whether a submitter of information is limited to judicial review of the agency record as his only recourse in the event of an agency determination adverse to interests he asserts are protected by Exemption 4 and/or 18 U.S.C. § 1905.

Reformulated in terms reflecting the perspective of *amicus,* the fundamental question is: May the Federal government, as possessor of valuable information as a

[2] 81 Stat. 54, 5 U.S.C. § 552 (P.L. 90-23, 90th Congress, 1st Session (1967), as amended).

[3] 86 Stat. 770 (P.L. 92-463, 92nd Congress, 2nd Session (1972), as amended).

consequence of its offer to support research projects it deems to be in the public interest, at its discretion, effect a diminution of the value of the ideas to submitting investigators, foreclose the transformation of the ideas into commercially valuable intellectual property, and deprive the public of potential benefits from Federally funded research?

Amicus recognizes that the specific items of information giving rise to this case are conceded by the parties to fall within the scope and coverage of Exemption 4. Accordingly, it recognizes that arguments as to the merits of including information contained in EEOC reports, affirmative action plans and the like within the scope of Exemption 4 are not pertinent to this case. *Amicus* will, however, direct some discussion to issues related to the scope of Exemption 4 in order to illustrate to the Court the injury to the public interest that will result from any determination that the exemption is discretionary rather than mandatory.

SUMMARY OF THE ARGUMENT

Creative ideas are valuable to a research investigator as his stock-in-trade and to society as a means of facilitating solutions to important national problems. To the extent that it may result in product innovations, an investigator's work is both of commercial significance and of public benefit in making available useful materials, such as, for example, life saving drugs or medical devices. Preservation of these values, however, requires that the investigator's ideas and works not be given premature public disclosure.

The FOIA and the FACA affect the timing of disclosure and should be interpreted in a fashion to protect both the investigator's and the public interest. Such

an interpretation is consistent with sound public policy, with Congressional intent, and with Constitutional directives.

ARGUMENT

I. An Investigator's Ideas and Creative Work Are Valuable

A. To the investigator because:

The advancement, remuneration, professional recognition, and personal satisfaction of a scientist depend upon the soundness of his ideas and the skill with which the scientist applies them to a research problem. The problems selected by applicants in seeking Federal research support and the results of the research (in terms of contribution to science, recognition of the effort as an original product, being the first to publish the research findings, and the like) are thus of substantial "proprietary" interest to him and are traditionally treated in this regard by the scientific community and by the Federal granting authorities,[4] regardless of the locus of research.

B. To society at large for their contribution to the resolution of problems of public significance because:

1. They illuminate our understanding of human problems. Federal agencies support academic research

---

[4] One member of an NIH initial review group (Dr. Walter Eckhart of the Salk Institute) characterized the importance of an application to an applicant as follows: the 4 to 5 hours a primary reviewer may spend studying an application "is done not so much because of a sense of responsibility or what the other members may think of your presentation, but because one knows that for the applicant it's a matter of life or death". Quoted in Wade, "Peer Review System: How to Hand Out Money Fairly", 179 *Science* (No. 4069) 158, 159 (1973).

because of public recognition of the contributions such research may make to the solution of human problems. For example, the Department of Health, Education, and Welfare is authorized to "encourage, cooperate with, and render assistance to other appropriate public authorities, scientific institutions, and scientists in the conduct of, and [to] promote the coordination of research, investigations, experiments, demonstrations, and studies relating to the causes, diagnosis, treatment, control and prevention of physical and mental diseases and impairments of man . . ." 42 U.S.C. § 241. Specifically, the Department of Health, Education, and Welfare is authorized to make "grants-in-aid to universities, hospitals, laboratories, and other public or private institutions, and to individuals for such research projects." 42 U.S.C. § 241 (c).

The recognized preeminence of the United States in the field of biomedical research, the scientific capabilities of modern medicine, the advances made in alleviating or ameliorating previously devastating disease problems testify to the success of this approach. The continual increase in appropriations for the programs of the National Institutes of Health,[5] testify to the Congressional and public support of this as an appropriate public policy.

2. They are a source of innovations resulting in useful products.

> "From 1969 through the fall of 1974 estimates of the Department show that the intellectual property rights to 329 innovations either generated, enhanced, or corroborated in the performance of Department [of Health Education and Welfare]—funded research were under control of university patent-management offices . . ."[6]

These innovations included drugs and therapeutic agents which promise great benefit in improving health and improving the quality of life of mankind.

[5] NIH appropriations have increased from $34.8 *million* in 1950 to over $2.5 *billion* in 1977. Basic Data Relating to the National Institutes of Health, DHEW Publication No. (NIH) 77-1261, 1977, Table 12.

II. An Investigator's Ideas, Properly Developed, Often Are Transformed Into Commercially Valuable Property.

It is clear from the preceding quotation that an investigator's ideas and research efforts often result in patentable innovations. It should also be apparent that when this work has matured from a concept to a patented innovation it is transformed into identifiable "intellectual property" and its owner acquires substantial protection under U.S. patent and property laws. Furthermore, an idea or innovation may be commercially valuable, even absent the protections of a patent, if it is managed in a manner suitable to acquiring and preserving the character of a trade secret.

Patented innovations are of little direct concern in this case because of their protection in law. Of direct and substantial concern to *amicus,* however, are those inchoate forms of intellectual property represented by an innovation which may be patentable, but is not yet at a stage where it can be patented, and those insights which may form the basis for a commercially valuable trade secret. The possibility of obtaining a patent is jeopardized and, in some cases foreclosed, by uncondi-

[6] Report of the President's Biomedical Research Panel—Disclosure of Research Information, at 15. DHEW Publication No. (OS) 76-513, June 30, 1976.

tioned disclosure prior to the filing of the patent application. A trade secret loses its value upon disclosure to the public.

Patent laws of both the United States and foreign countries are drafted against the interest of those parties making or permitting publication of their innovation prior to the filing of a patent application. In the United States, publication of an unpatented invention initiates a one-year statutory period for filing a patent application on the innovation or valid patent protection is precluded. In most foreign countries valid protection is precluded if a patent application had not been filed *prior* to the date on which the information was *first* disclosed.

Within the patent laws, publication has been broadly defined as any *unconditional disclosure* by its owner of information on an innovation of interest. For example, even a thesis available on the shelves of a university library but not necessarily reviewed by any researcher has been deemed in the context of the patent laws, to be a publication of the innovation disclosed therein.[7]

III. Exemption 4 of the FOIA Is of Crucial Significance in the Protection of an Investigator's Ideas.

A. Premature Disclosure Diminishes an Investigator's Stock-in-Trade.

Traditionally, Federal granting agencies have recognized and protected a scientist's proprietary inter-

[7] Hamilton Laboratories v. Massengill, 111 F. 2d 584, 45 U.S.P.Q. 594 (6th Cir. 1940); Indiana General Corp. v. Lockheed Aircraft Corp., 249 F. Supp. 809, 148 U.S.P.Q. 312 (S.D. Cal. 1966); Gulliksen v. Halberg, 75 U.S.P.Q. 252 (Bd. App. 1937); *Ex parte* Hershberger, 96 U.S.P.Q. 54 (Bd. App. 1952).

est in his work. Applications submitted for funding and the research protocols they contained have been withheld from disclosure under the authority of Exemption 4. It was clearly recognized that making the preliminary research, research designs and protocols public at the time of application would violate the proprietary rights of applicants and greatly enhance the danger that the applicant's ideas (his stock-in-trade) will be appropriated by others. Another researcher might modify the original proposal, be awarded the grant and be the first to publish findings thereby not only causing loss of the research opportunity and grant to the initial applicant but also crediting the subsequent applicant with the idea.

These concerns of the research scientist are very real and highly important, and preoccupy them constantly. The essence of this concern was expressed by Dr. James Dewey Watson, Nobel laureate and Professor of Molecular Biology, Harvard University, when he candidly said that "we [scientists] all know too well that the types of jobs we eventually get are very much dependent upon how much we produce. There is little enthusiasm for those who always come in second."[8] Professor Watson, in observing that "success in generating new ideas usually being more than the simple combination of native intelligence and a good measure of luck", pointed out that "(a)ll too often science resembles playing poker for very high stakes, where re-

[8] Watson, "The Sharing of Unpublished Information," second Frank Nelson Doubleday Lecture for 1973-74, at the National Museum of History and Technology, January 29, 1974, prepared remarks at 4.

vealing one's hands prematurely makes sense only when you have all the low cards."[9]

This policy of governmental protection of a scientist's ideas was challenged by the Washington Research Project, Inc. when denied access to research protocols funded by the National Institutes of Mental Health.[10] The court concluded, in denying the use of the "trade secrets" exemption, that

> "It is clear enough that a noncommercial scientist's research design is not literally a trade secret or item of commercial information, for it defies common sense to pretend that the scientist is engaged in trade or commerce. This is not to say that the scientist may not have a preference for or an interest in nondisclosure of this research design, only that it is not of trade or commercial interest. . ."[11]

While the court allowed, in a footnote, that it might have reached a different result had there been a demonstration of the commercial character of the research projects at issue, *amicus* contends that this overly narrow reading of Exemption 4 focuses unduly on the nature and organizational locus of the submitter rath-

---

[9] *Id.* at 3.

[10] Washington Research Project, Inc. v. Weinberger, 504 F.2d 238 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 963 (1975).

[11] 504 F.2d at 241. The Court, in rejecting the "stock-in-trade" contention, did not take cognizance of the very extensive activities of many colleges and universities in licensing their inventions for commercial development. For example, the [University] of Wisconsin Alumni Research Foundation has, over a 51 year period, licensed inventions resulting in nearly $2 *billion* in sales and the return of substantial royalties utilized for university research. Hearings on the Business Record Exemption of the Freedom of Information Act before a Subcommittee of the House Committee on Government Operations, 95th Cong., 1st Sess. (1977), at 321.

er than the character of the information and the interests at stake. Certainly an argument can be made that protection, under law, of the intellectual property of investigators employed at universities and other nonprofit institutions ought to be equal to that protection accorded commercial firms. If Exemption 4 were considered to cover the information protectable under 18 U.S.C. § 1905, it seems clear that universities and nonprofit organizations would as a minimum occupy a position equal to commercial concerns under FOIA and FACA, since the protection anticipated by 18 U.S.C. § 1905 clearly extends to non-commercial organizations as well as to commercial enterprises. Further, such an approach would assure more predictable protection because 18 U.S.C. § 1905 contains a definitive identification of proprietary information and because Government officials would carefully adhere to this definition due to the penalties prescribed.

In the view of Representative John E. Moss, known as the "Father of FOIA," it was the Congressional intent that there be a close identification of 18 U.S.C. § 1905 and Exemption 4. In a summary of a November 10, 1975, meeting on FOIA with Representative Barry Goldwater, Jr.,:

> "Mr. Moss indicated that, as an original author of the Freedom of Information Act, it was his intent and understanding that exemption (b)(4) would authorize the withholding from disclosure under that Act of all 'confidential information' protected by 18 U.S.C. 1905 in the criminal code. He further indicated that 18 U.S.C. 1905 was not intended as the authority to withhold such information under the Freedom of Information Act, but rather it was to be the test for what information was authorized to be withheld under the authority in exemp-

tion (b)(4). He expressed disappointment that recent court holdings have not correctly interpreted this connection and often have held to the contrary that 18 U.S.C. 1905 information is not necessarily protected under (b)(4), based on the adoption by the courts of various other tests for exemption (b)(4) coverage." [12]

B. PREMATURE DISCLOSURE DESTROYS THE TRADE SECRET VALUE AND POTENTIAL PATENTABILITY OF INNOVATIONS.

Notwithstanding the decision in *Washington Research Project,* and assuming *arguendo* that it correctly states the law with respect to funded applications where no specific showing of a commercial interest is made, there remains a basic and difficult problem regarding the treatment of inchoate intellectual property resulting from judicial interpretations of Exemption 4 and the administrative difficulties of agency compliance.

To the extent that FOIA requires disclosure prior to the funding of research projects, it is unrealistic to expect that investigators or their institutions would be able to protect their intellectual property rights by filing a patent application at this early stage of investigation. The clinical or other corroborating data necessary to support a patent claim would obviously be lacking. The filing of a patent application without such data, if possible at all, would be based on the uneconomic, speculative basis of possible future findings. The unfunded investigator with a research proposal before the Government would be foreclosed from

[12] 121 Cong. Rec. H 12379 (Dec. 11, 1975). The full Summary of the Nov. 10, 1975, meeting is attached as Appendix A.

the protection of his innovative ideas as trade secrets under the common law to the extent that disclosure is required under FOIA.[13]

FOIA would appear to require that unfunded research proposals be reviewed on an individual case basis as to whether they are exempt from disclosure under Exemption 4. However, it is difficult (if not impossible) to determine at the design phase of an experiment whether and to what extent it is exempt from disclosure under this authority. As to those portions that *might* be deemed exempt under Exemption 4, at that stage it is even more difficult to segregate data of potential commercial significance from those that do not have this value. In fact, the experiment itself, *if* funded, is conducted to answer these questions. This administrative quagmire demonstrates the practical difficulty of providing adequate protection for unfunded research proposals under the FOIA.

This difficulty is compounded by court interpretations of Exemption 4. The decision from the leading case on this exemption (*National Parks and Conservation Association* v. *Morton,* 498 F. 2d 765 (D.C. Cir. 1974)) states that the exemption applies if it can be shown that disclosure was likely either, first, to impair the Government's ability to obtain necessary infor-

[13] In other circumstances, an application for governmental assistance does not constitute a waiver of an innovator's claim to protection from disclosure of a trade secret. *See, e.g.,* Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470 (1970) (the enactment of the U.S. patent laws do not deprive States of their ability to protect trade secrets); Sears v. Gottschalk, 357 F. Supp. 1327 (E.D. Va. 1973), aff'd. 502 F. 2d. 122 (4th Cir. 1974) (patent applications denied patent protection are nevertheless protected from disclosure under the FOIA by Exemption 4 as trade secrets).

mation, or second, to cause substantial harm to a competitive position of a person providing the information. The standard was further restricted in *Petkas* v. *Staats* (501 F. 2d 887 (1974)) where the court refused to accept a Government assurance of nondisclosure contained in a regulation requiring information. A corporation's reliance on this assurance, and the filing of the information conditioned on confidentiality, were not considered determinative and the court remanded the case for disposition in accordance with the test of the *National Parks* case noted above. Consequently, a pledge of confidentiality by the Government, in and of itself, may not prevent disclosure.

Further, Title 18 U.S.C. § 1905 appears to be given little effect in Freedom of Information Act suits. This statute, when applicable, imposes criminal penalties on Government officials who disclose proprietary information in the possession of the Government. It is a deterrent to unauthorized disclosure, although it takes effect only after the disclosure and the damage has been suffered by the owner. Title 18 U.S.C. § 1905 contains a general exemption, "unless otherwise provided by law", and has not been given effect by some courts in Freedom of Information Act suits. These courts have interpreted the quoted passage as permitting disclosure under the Freedom of Information Act, or as the court below, under agency disclosure regulations. The penalties specified in Section 1905, therefore, have not been applied to an official who disclosed proprietary information in response to a Freedom of Information request.

Since the Government controls the preponderance of the financial resources now supporting research at universities and non-profit organizations, especially

in the area of biomedical research, it is clear in practice that a university or nonprofit organization investigator seeking Federal support to verify his innovative ideas will not be able to protect his inchoate or identified intellectual property under the first test of *National Parks* (impairment of government's ability to obtain material). If susceptability to disclosure is a condition of seeking Federal funding, investigators will not be in a position to refuse to submit their research proposals for funding because of the financial leverage possessed by the Government.

Even though commercial concerns might, with some difficulty, meet the second or "substantial harm to a competitive position" test of the *National Parks* case, universities and nonprofit organizations wishing to control access to their unfunded research proposals appear to have an even greater burden in meeting this test in light of *Washington Research Project, Inc.*[14]

C. The Withholding of a Research Proposal is Inadequately Provided for under Present Cases Covering the Fourth Exemption of FOIA.

In order to deny information, the Federal administrator handling the request must apply the *National Parks* test to the situation and provide to the Department Public Information Officer a written *prima facie* case for denial. (The case would need to include arguments on how a nonprofit organization could have a competitive position in order to overcome the negation of such possibility by the *National Parks* and *Washington Research Project, Inc.*, cases.) Before a *prima facie* case could be made to deny a disclosure request involving an idea, invention, or discovery, a prior art

[14] *Supra*, note 10.

review would need to be conducted indicating that such an idea, invention, or discovery is in fact novel in comparison to the "prior art". If novelty cannot be shown, it seems clear that the Government could not prevail in a suit to show that there will be "substantial harm to the owner's competitive position." It is worth asking whether a Federal administrator, even with the aid of the investigator whose idea is involved, can show, especially prior to the funding of a research proposal, that such proposal is novel compared to the prior art. The primary purpose of conducting the research is to demonstrate that the idea is indeed novel.

Even if the Federal administrator is able to make a *prima facie* case establishing that the research proposal falls within the fourth exemption, there is no guarantee that the Department Public Information Officer would accede to the recommended denial in light of the May 5, 1977, instructions from the Attorney General to the Agencies of the Executive Branch that

> "The government should not withhold documents unless it is important to the public interest to do so, even if there is some arguable legal basis for the withholding. In order to implement this view, the Justice Department will defend Freedom of Information Act suits only when disclosure is demonstrably harmful, even if the documents technically fall within the exemptions in the Act." [15]

The need to adequately protect these inchoate or identifiable rights prior to Government funding becomes more apparent when it is realized that only

[15] Letter to Heads of all Federal Departments and Agencies *re*: "Freedom of Information Act" dated May 5, 1977, from Griffin B. Bell, Attorney General, copy attached as Appendix B.

approximately one-third of these proposals are in fact ultimately funded. Thus, if disclosure of these proposals on receipt by the Government becomes the rule rather than an exception, the intellectual property in the two-thirds of unfunded proposals will be forever destroyed without an offsetting benefit to the submitting investigator or the public. *Amicus* believes adequate safeguards for the protection of intellectual property rights of investigators with research proposals before the Federal Government is a matter of basic equity and sound policy. Protection of intellectual property is a right recognized by the Congress and the courts in implementing Article I, Section 8, Paragraph 8 of the Constitution and the common law protection afforded those who wish to maintain their innovative ideas as secrets. Moreover, the remarkably productive partnership between the Federal Government and the non-Federal research community is based in part on the principle of protection of the ideas of such investigators and is widely considered to be in the best interests of the American people.

IV. Harm to the Public Interest Results from Current Unpredictability of Protection from Disclosure.

Amicus believes it is possible to estimate, in a general sense, the potential harm that results if protection of individual intellectual property by Government agencies remains in its present state of unpredictability. *Amicus* has long been concerned with the problems of transfer of research progress, technology, and information from the "laboratory bench to the public."

A number of studies have yielded evidence of a clear link between the need to protect intellectual property rights and the successful transfer of research innova-

tions to the delivery of health care. In a 1968 report, "Problem Areas Affecting Usefulness of Results of Government-Sponsored Research in Medicinal Chemistry,"[16] the General Accounting Office pointed out that from 1962 to 1968 there was a virtual industry-wide boycott on the exploitation of drug research leads generated by research sponsored by the National Institutes of Health. This report forcefully concludes that where substantial private risk investment is needed, such as that required for premarket clearance of potential therapeutic agents and, now, of some classes of medical devices, there is an identified likelihood that transfer will not occur if the entrepreneur is not afforded some property protection in the innovation offered for development.

Since 1968 there have been specific efforts through the patent program of the Department of Health, Education, and Welfare to close the recognized gap between the discoveries made under research support and the willingness of private industrial developers to invest the funds necessary to deliver the innovations to the market place. The main thrust of the Department's patent policy has been to assure that the innovating group has the right to convey whatever intellectual property rights are necessary for possible licensing of industrial developers. Not all transfers of potentially marketable innovations from such organizations require an exchange of intellectual property rights in the innovation, but it is unpredictable in which transfers entrepreneurs will demand an exchange to guarantee their collaborative aid.

[16] GAO Report No. B-164031 (2), 1968.

> "During the period from 1969-1974, 44 nonexclusive and 78 exclusive licenses had been negotiated under the patent applications filed through these university patent-management offices. According to the figures furnished by the Department, the 122 licenses negotiated have generated investments of around $100 million of private risk capital, in complete contrast to the period 1962 to 1968, during which there was almost no industry interest in research leads of Department-funded research. In the period 1969 to 1974, two licenses resulted in the marketing of two drugs, while a number of other licenses cover potential therapeutic agents in various stages of pre-market clearance. This record is even more impressive in view of the fairly lengthy period required to obtain approval to market a new drug."[17]

In the above context, it is apparent that the existence of a licensable patent right may be a primary factor in the successful transfer of a university innovation to industry and the marketplace. *Amicus* is concerned that the failure to protect and define such rights may fatally affect the transfer of major health innovations.

For this reason, *amicus* is seriously concerned about the unpredictability of Government protection for intellectual property rights, because of the uncontrolled and unconditioned disclosure of research information under current court interpretation of FOIA. This state of affairs is likely to stifle industry interest in developing potentially important research innovations. Without industry involvement, the transfer of research findings to clinical practice will be impeded.

[17] Report of the President's Biomedical Research Panel, *supra* note 6 at 15.

In the judgment of *amicus,* there are strong reasons to conclude that the interface between research and health care delivery, an area of vital national interest, is likely to be impaired unless adequate protection is provided for intellectual property rights of investigators whose research is conducted with Federal financial support.

V. The FOIA Must Be Interpreted Consistent With Relevant Constitutional and Statutory Provisions and with the Public Interest.

The Freedom of Information Act contains no provision for according submitters of information due process of law in any decision to disclose information of value to the submitters. Nor does the Act contain a provision to compensate the submitter for the value of information destroyed by its disclosure to the public. As asserted above, the result of disclosure is a general harm to the long range public interest. These considerations argue forcefully that the Congress never intended a submitter of information to be dispossessed of valuable property by operation of the FOIA. Instead, Congress intended, as stated by Mr. Moss, that Exemption 4 would preserve the confidentiality of such valuable information and that it would be read in conjunction with Section 1905 of Title 18. A contrary reading of Exemption 4 has the effect of subverting the Constitutional mandate that Congress promote the useful arts, Article I, Section 8, Paragraph 8, and would be violative of the clear mandate of the Fifth Amendment of the Constitution prohibiting the deprivation of property without due process of law. These considerations in turn lead to the conclusion that Exemption 4 constitutes a mandatory prohibition against the disclosure by government agencies of information described therein and in Section 1905 of Title 18.

CONCLUSION

It is the position of *amicus* that the public interest is served by a governmental policy which accords adequate recognition to the concept that the research investigator's ideas are valuable and constitute actual or inchoate intellectual property. Untimely disclosure or unrestricted access to materials contained in research grant applications through the operation of the FOIA will result in the destruction of valuable property rights, will undermine the effectiveness of the system for awarding grants on the basis of scientific merit, and will inhibit and in some cases preclude the transfer of technology from the "laboratory to the patient bed." These conclusions are supported by and reflected in the recommendations of two independent Congressionally commissioned studies of the implication of disclosure of information contained in research protocols, research hypotheses, and research designs obtained by the Secretary of Health Education and Welfare in connection with applications or proposals submitted to the Secretary for a grant, fellowship, or contract under the Public Health Service Act.[18]

---

[18] Report of the President's Biomedical Research Panel—Disclosure of Research Information, DHEW Publication No. (OS) 76-513, June 30, 1976.

Disclosure of Research Information under the Freedom of Information Act—The National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research, DHEW Publication No. (OS) 77-003, 1977.

While each of these reports conclude that new legislation will be required to assure these objectives, *amicus* contends that they will be achieved through a proper construction of Exemption 4 of the FOIA and 18 U.S.C. § 1905, by this Court.

1. Consequently, we conclude and urge this Court to hold that Exemption 4 of the FOIA must be interpreted as a mandatory prohibition of agency action to disclose information described therein or in Section 1905 of Title 18.

2. *Amicus* strongly supports petitioner's contention that 5 U.S.C. § 301 does not constitute authorization by law within 18 U.S.C. § 1905 for disclosure of private, confidential business information. This conclusion, is essential to prevent the evisceration of Exemption 4. Finally it is consistent with sound public policy to provide protection to information submitted to the Government by universities and nonprofit organizations on an equal footing with information submitted by commercial concerns.

3. *Amicus* further supports the petitioner's contention that persons supplying information believed to fall within the Exemption or the protection of 18 U.S.C. § 1905 are entitled to a trial *de novo* prior to disclosure of such information by the Government. *Amicus* believes that the Government's unilateral ability to release privately owned intellectual property, inchoate or identifiably patentable subject matter, or information protectable at common law as secret, is constitutionally suspect as a disposition of property without due process of law and thus requires adequate opportunity for the submitter to enjoin such release before irreparable damage occurs.

For the foregoing reasons, the decision of the circuit court should be reversed.

Respectfully submitted,

JOSEPH A. KEYES, JR.
Attorney for Amicus Curiae
Suite 200. One Dupont Circle, N.W.
Washington, D.C. 20036

June 5, 1978

APPENDIX

APPENDIX A

CONGRESSIONAL RECORD—HOUSE

December 11, 1975 H 12379

Summary of Meeting of Representative John E. Moss with Representative Barry M. Goldwater, Jr., on the Freedom of Information Act, Nov. 10, 1975

1. We agreed that it is extremely important and in the national interest that ERDA have the full cooperation and participation of the private sector, particularly American industry, in the conduct of the national energy R&D effort. This cooperation and participation is essential to ensure the success of the national effort, by providing ERDA access to existing technology and access to past, present and future successes and failures in the private sector's energy R&D activities in order to most effectively manage the national effort.

2. We agreed that any lack of predictable protection of the private sector's proprietary information under the existing Freedom of Information Act exemption from mandatory disclosure for such information (5 U.S.C. 552(b)(4)) could seriously inhibit private sector cooperation and participation with ERDA to the detriment of the national energy research and demonstration program.

3. Mr. Moss acknowledged Mr. Goldwater's conclusion, based on an independent staff legal analysis, that protection under exemption (b)(4) is neither predictable nor adequate because of recent court interpretations of the exemption.

4. Mr. Moss indicated that, as an original author of the Freedom of Information Act, it was his intent and understanding that exemption (b)(4) would authorize the withholding from disclosure under that Act of all "confidential information" protected by 18 U.S.C. 1905 in the criminal code. He further indicated that 18 U.S.C. 1905 was not intended as the authority to withhold such information

under the Freedom of Information Act, but rather it was to be the test for what information was authorized to be withheld under the authority in exemption (b)(4). He expressed disappointment that recent court holdings have not correctly interpreted this connection and often have held to the contrary that 18 U.S.C. 1905 information is not necessarily protected under (b)(4), based on the adoption by the courts of various other tests for exemption (b)(4) coverage.

5. Mr. Moss indicated that exemption (b)(3), "specifically exempted from disclosure by statute" could be utilized to create a narrow statutory exemption in other statutes where Congress concluded that there was a legitimate national interest to be effectuated by withholding a class of information. In so concluding, Congress must strike a reasonable and acceptable balance between that national interest and the national interest in public access to Federal government information effectuated by the Freedom of Information Act.

6. We agreed that, in light of the apparent state of unpredictability of protection for proprietary information under exemption (b)(4) and the need for ERDA to provide such predictable protection in order to ensure the full cooperation and participation of the private sector, Congress could conclude that there was a legitimate national interest in ERDA's having the specific authority to predictably protect proprietary information. Further, Congress could strike a reasonable and acceptable balance of that national interest and the national interest in freedom of information and create a (b)(3) exemption for ERDA for that purpose.

7. Finally, we reviewed a draft of a provision to authorize such a (b)(3) exemption for ERDA. Mr. Moss did not comment on the specific language, but did indicate that in concept the approach of the provision was acceptable and in accordance with the preceding discussion and, further,

that he did not object to it. Subsequently, he indicated that the specific language could be improved, but again, that he had no fundamental objection to the approach represented by the draft provision. The statutory test for the class of information, consistent with basic FOIA principles, would, of course, be subject to judicial review under current FOIA procedure.

8. Mr. Moss emphasized that the proposed statutory language provides no authority to withhold information from Congress, or any committee or subcommittee of Congress. He also stated his belief that any Member of Congress should be able to have access to such information.

9. We agree that the above summary accurately reflects the substance of our meeting.

Signed,

JOHN E. MOSS,
BARRY M. GOLDWATER, JR.

APPENDIX B

Letter dated 5/5/77

OFFICE OF THE ATTORNEY GENERAL
WASHINGTON, D.C. 20530

LETTER TO HEADS OF ALL FEDERAL DEPARTMENTS AND AGENCIES

Re: *Freedom of Information Act*

I am writing in a matter of great mutual concern to seek your cooperation.

Freedom of Information Act litigation has increased in recent years to the point where there are over 600 cases now pending in federal courts. The actual cases represent only the "tip of the iceberg" and reflect a much larger volume of administrative disputes over access to documents. I am convinced that we should jointly seek to reduce these disputes through concerted action to impress upon all levels of government the requirements, and the spirit, of the Freedom of Information Act. The government should not withhold documents unless it is important to the public interest to do so, even if there is some arguable legal basis for the withholding. In order to implement this view, the Justice Department will defend Freedom of Information Act suits only when disclosure is demonstrably harmful, even if the documents technically fall within the exemptions in the Act. Let me assure you that we will certainly counsel and consult with your personnel in making the decision whether to defend. To perform our job adequately, however, we need full access to documents that you desire to withhold, as well as the earliest possible response to our information requests. In the past, we have often filed answers in court without having an adequate exchange with the agencies over the reasons and necessity for the withholding. I hope that this will not occur in the future.

In addition to setting these guidelines, I have requested Barbara Allen Babcock, Assistant Attorney General for the Civil Division, to conduct a review of all pending Freedom of Information Act litigation being handled by the Division. One result of that review may be to determine that litigation against your agency should no longer be continued and that information previously withheld should be released. In that event, I request that you ensure that your personnel work cooperatively with the Civil Division to bring the litigation to an end.

Please refer to 28 CFR 50.9 and accompanying March 9, 1976 memorandum from the Deputy Attorney General. These documents remain in effect, but the following new and additional elements are hereby prescribed:

In determining whether a suit against an agency under the Act challenging its deniel of access to requested records merits defense, consideration shall be given to four criteria:

(a) Whether the agency's denial seems to have a substantial legal basis,

(b) Whether defense of the agency's denial involves an acceptable risk of adverse impact on other agencies,

(c) Whether there is a sufficient prospect of actual harm to legitimate public or private interests if access to the requested records were to be granted to justify the defense of the suit, and

(d) Whether there is sufficient information about the controversy to support a reasonable judgment that the agency's denial merits defense under the three preceding criteria.

The criteria set forth above shall be considered both by the Freedom of Information Committee and by the litigating divisions. The Committee shall, so far as practical,

employ such criteria in its consultations with agencies prior to litigation and in its review of complaints thereafter. The litigating divisions shall promptly and independently consider these factors as to each suit filed.

Together I hope that we can enhance the spirit, appearance and reality of open government.

Yours sincerely,

/s/ GRIFFIN BELL
Griffin B. Bell
Attorney General

Supreme Court, U.S.
FILED
JUN 5 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-922

CHRYSLER CORPORATION, *Petitioner*

v.

HAROLD BROWN, et al., *Respondents.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL

MICHAEL S. HORNE
BRUCE D. SOKLER
STEPHEN R. MYSLIWIEC
COVINGTON & BURLING
888 Sixteenth Street, N.W.
Washington, D.C. 20006

Attorneys for Amicus Curiae, The Equal Employment Advisory Council

Of Counsel:

ROBERT E. WILLIAMS
DOUGLAS S. MCDOWELL
MCGUINESS & WILLIAMS
1747 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

June, 1978

TABLE OF CONTENTS

Page

INTEREST OF THE AMICUS CURIAE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. THE RELEVANT STATUTES DICTATE THAT THE GOVERNMENT NOT DISCLOSE, WITH RARE EXCEPTIONS NOT RELEVANT HERE, THE CONFIDENTIAL FINANCIAL AND COMMERCIAL INFORMATION AND TRADE SECRETS OF PRIVATE PARTIES 5

A. The Freedom of Information Act Does Not Authorize Disclosure Of Exempt Information Falling Within Section 1905 8

B. The Third Circuit Erred In Holding That 5 U.S.C. § 301 Authorizes Executive Agencies To Exempt Themselves From The Nondisclosure Policy of 18 U.S.C. § 1905 11

C. Even If The Third Circuit's Expansive View Of Section 301 Were Sound, The OFCCP's So-called Disclosure Regulations Cannot Constitute The Requisite "Authorized By Law" For Section 1905 Purposes Since Those Regulations Do Not Even Purport To Invoke Section 301 Or To Authorize Disclosure Of Information Within 18 U.S.C. § 1905 17

II. EVEN IF GOVERNMENT OFFICIALS HAVE SOME RESIDUAL AUTHORITY WHICH PERMITS THEM TO DISCLOSE THE CONFIDENTIAL FINANCIAL AND COMMERCIAL INFORMATION OF PRIVATE PARTIES THAT IS EXEMPT FROM MANDATORY DISCLOSURE, SOME GUIDELINES FOR THE EXERCISE OF THAT AUTHORITY SHOULD BE ARTICULATED 21

A. The Broad Public Policy of Protecting The Confidentiality Of Competitively Sensitive Information Must Be Given Considerable Weight 22

Page

B. The Character, Purposes And Alternatives Of The Information Requestor Have To Be Weighed 24

C. The Impact On The Underlying Regulatory Scheme Must Be Considered 26

III. The Third Circuit Erred In Concluding That the District Court Cannot Determine *De Novo* the Applicability of FOIA Exemptions. 28

A. The Third Circuit's Doctrinal Justifications For Rejecting A Trial *De Novo* Are Unpersuasive 29

B. Doctrinal Niceties Aside, *De Novo* Determinations Of The Claims Of Information Providers As To The Applicability Of FOIA Exemptions Are Both Necessary And Practical 34

Conclusion 47

TABLE OF AUTHORITIES

Cases:

American Jewish Congress v. *Kreps*, No. 76-1559 (D.C. Cir., March 15, 1978) 30, 33
Babcock & Wilcox Co v. *Rumsfeld*, 70 F.R.D. 595 (N.D. Ohio 1976) 14, 21
Banks v. *Lockheed-Georgia Co.*, 53 F.R.D. 283 (N.D. Ga. 1971) 28
Blair v. *Oesterlein Co.*, 275 U.S. 220 (1927) 16
Board of Trade of City of Chicago v. *Christie Grain & Stock Co.*, 198 U.S. 236 (1905) 8
Braude v. *Wirtz*, 350 F.2d 702 (9th Cir. 1965) 34
Burlington Truck Lines, Inc. v. *United States*, 371 U.S. 156 (1962) 19
Califano v. *Sanders*, 430 U.S. 99 (1977) 28
Camp v. *Pitts*, 411 U.S. 138 (1973) 42
Charles River Park "A," Inc. v. *Department of Housing and Urban Development*, 519 F.2d 935 (D.C. Cir. 1975) 9, 14, 15, 17, 31, 42, 46

Page

Charlotte-Mecklenburg v. *Perry*, 16 FEP Cases 680 (4th Cir., January 26, 1978) 23
Chrysler Corp. v. *Schlesinger*, 412 F. Supp. 171 (D. Del. 1976) .....Passim
Chrysler Corp. v. *Schlesinger*, 565 F.2d 1172 (3rd Cir. 1977) .....Passim
Cobb v. *Murrell*, 386 F.2d 947 (5th Cir. 1967) 34
Consumers Union, Inc. v. *Cost of Living Council*, 491 F.2d 1396 (T.E.C.A.), *cert. denied sub nom. Business Roundtable* v. *Consumers Union*, 416 U.S. 984 (1974) 17
Continental Oil Co. v. *Federal Power Commission*, 519 F.2d 31 (5th Cir. 1975) 23
Cort v. *Ash*, 422 U.S. 66 (1975) 44, 45
Crown Central Petroleum Corp. v. *Kleppe*, 424 F. Supp. 744 (D. Md. 1976) 31
Department of the Air Force v. *Rose*, 425 U.S. 352 (1976) 9, 11, 23
Dickerson v. *United States Steel Corp.*, 12 EPD ¶ 11,095 (E.D. Pa. 1976) 27
Environmental Protection Agency v. *Mink*, 410 U.S. 73 (1973) 9
Exchange National Bank v. *Abramson*, 295 F. Supp. 87 (D. Minn. 1969) 17
FAA Administrator v. *Robertson*, 422 U.S. 225 (1975) 9
Federal Power Commission v. *Florida Power & Light Co.*, 404 U.S. 453 (1972) 38
Federal Trade Commission v. *Motion Picture Advertising Service Co.*, 344 U.S. 392 (1953) 38
General Dynamics Corp. v. *Dunlop*, 427 F. Supp. 578 (E.D. Mo. 1976) 31
General Dynamics Corp. v. *Marshall*, 16 FEP Cases 898 (8th Cir., February 14, 1978) 14, 31, 42
Ginsburg, Feldman & Bress v. *Federal Energy Administration*, No. 76-1759 (D.C. Cir., February 14, 1978) (*vacated and reargued en banc*, April 16, 1978) 13
Holiday Inns, Inc. v. *Kleppe*, 13 FEP Cases 1337 (W.D. Tenn. 1976) 14, 31
Hughes Aircraft Co. v. *Schlesinger*, 384 F. Supp. 292 (C.D. Cal. 1974), *appeal pending*, No. 75-1064 (9th Cir.) 37, 44

Page

International Bro. of Teamsters v. *United States*, 431 U.S. 324 (1977) 27
Interstate Commerce Commission v. *Mechling*, 330 U.S. 567 (1947) 38
Irons v. *Gottschalk*, 548 F.2d 992 (D.C. Cir. 1976) ... 30
Kansas City Power & Light Co. v. *McKay*, 225 F.2d 924 (D.C. Cir. 1955) 34
Kewanee Oil Co. v. *Bicron Corp.*, 416 U.S. 470 (1974) 9
Lanzetta v. *New Jersey*, 306 U.S. 451 (1939) 31
Mead Data Central, Inc. v. *Department of the Air Force*, 556 F.2d 242 (D.C. Cir. 1977) 35, 36
Metropolitan Life Ins. Co. v. *Usery*, 426 F. Supp. 150 (D.D.C. 1976), *cert. before judgment denied*, 431 U.S. 924 (1977), *appeal pending sub nom. National Organization for Women* v. *Social Security Administration*, Nos. 77-1270, *et al.* (D.C. Cir., docketed March 15, 1977) 7, 14, 31, 37
Morton v. *Ruiz*, 415 U.S. 199 (1974) 20
National Labor Relations Board v. *Sears, Roebuck & Co.*, 421 U.S. 132 (1975) 23
National Parks & Conservation Association v. *Kleppe*, 547 F.2d 673 (D.C. Cir. 1976) 41
National Parks & Conservation Association v. *Morton*, 498 F.2d 765 (D.C. Cir. 1974) 7, 35, 39
Non-Resident Taxpayers Association v. *Municipality of Philadelphia*, 478 F.2d 456 (3rd Cir. 1973) ...16, 17
Papachristou v. *City of Jacksonville*, 405 U.S. 156 (1972) 31
Parker v. *Bell Helicopter Co.*, No. CA 4-75-61 (N.D. Tex. 1977) 27
Parkridge Hospital, Inc. v. *Blue Cross & Blue Shield of Tennessee*, 430 F. Supp. 1093 (E.D. Tenn. 1977) 14
Pennzoil Co. v. *Federal Power Commission*, 534 F.2d 627 (5th Cir. 1976) 23
Peabody v. *Norfolk*, 98 Mass. 452, 96 Am. Dec. 644 (1968) 8
Planning Research Corp. v. *Federal Power Commission*, 555 F.2d 970 (D.C. Cir. 1977) 28, 43
Pleasant Hill Bank v. *United States*, 58 F.R.D. 97 (W.D. Mo. 1973) 17
Rasmussen v. *United States*, 421 F.2d 776 (8th Cir. 1970) 34

Page

Robertson v. *Department of Defense*, 402 F. Supp. 1342 (D.D.C. 1975) 37
Sanday v. *Carnegie-Mellon University*, 12 FEP Cases 101 (W.D. Pa. 1975) 28
Sea-Land Service, Inc. v. *Morton*, 11 EPD ¶ 10,792 (D.D.C. 1976) 37
Sears, Roebuck & Co. v. *Eckerd*, ~~12~~ FEP Cases 436 (7th Cir., April 25, 1978) ....*7*.....11, 14, 15, 45
Sears, Roebuck & Co. v. *General Services Administration*, 553 F.2d 1378 (D.C. Cir.), *cert. denied*, —— U.S. —— No. 76-1642, 1977) 28, 31, 37, 43, 46
Securities & Exchange Commission v. *Chenery Corp.*, 332 U.S. 194 (1946) 19
Skidmore v. *Swift & Co.*, 323 U.S. 134 (1944) 20
Sonderegger v. *Department of the Interior*, 424 F. Supp. 847 (D. Idaho 1976) 44
United States v. *Dicke*, 268 U.S. 378 (1925) 16
United States v. *Pennsylvania Industrial Chemical Corp.*, 411 U.S. 655 (1973) 20
United States Steel Co. v. *Schlesinger*, 8 EPD ¶ 9717 (E.D. Va. 1974) 7
Westinghouse Electric Corp. v. *Brown*, 443 F. Supp. 1225 (E.D. Va. 1977) 15, 23, 31, 37
Westinghouse Electric Corp. v. *Nuclear Regulatory Commission*, 555 F.2d 82 (3rd Cir. 1977) 16
Westinghouse Electric Corp. v. *Schlesinger*, 392 F. Supp. 1246 (E.D. Va. 1974) 7
Westinghouse Electric Corp. v. *Schlesinger*, 542 F.2d 1190 (4th Cir. 1976), *cert. denied*, 431 U.S. 924 (1977) 12, 14, 20, 23, 24, 31, 44

STATUTES:

Civil Rights Act of 1964:

Title VII, 42 U.S.C. § 2000e *et seq.* 2
Section 706(a), 42 U.S.C. § 2000e-5(b) 8
Section 709(e), 42 U.S.C. § 2000e-8(e) 8

Federal Aviation Act of 1958, Section 1104, 49 U.S.C. § 1504 33

Freedom of Information Act:

5 U.S.C. § 552 ..... 4, 6

Page

5 U.S.C. § 552(a)(3) 18
5 U.S.C. § 552(a)(6)(A)(i) 24, 29, 39
5 U.S.C. § 552(a)(6)(A)(ii) 29
5 U.S.C. § 552(b) 6, 9
5 U.S.C. § 552(b)(3) .....Passim
5 U.S.C. § 552(b)(4) .....Passim
5 U.S.C. § 552(b)(6) .....Passim

Privacy Act of 1974:

5 U.S.C. § 552a 37
5 U.S.C. § 552a(a)(5) 37
5 U.S.C. § 552a(b) 37

Social Security Act, Section 1106, 42 U.S.C. § 1306 ... 33

Trade Secrets Act, 18 U.S.C. § 1905 .....Passim

5 U.S.C. § 301 .....Passim
5 U.S.C. § 553 18
5 U.S.C. § 701 34
5 U.S.C. § 702 .....33, 34
5 U.S.C. § 705 42
13 U.S.C. § 9(a) 8
26 U.S.C. § 6103 8
26 U.S.C. § 7213 8
28 U.S.C. § 1331 28

REGULATIONS:

5 C.F.R. Part 294 36
21 C.F.R. § 4.45 36
24 C.F.R. Part 15 36
28 C.F.R. Part 16 36
29 C.F.R. Part 70 20

Page

29 C.F.R. § 70.21(a) 12, 20
31 C.F.R. Part 7 36
32 C.F.R. § 286.4(b) 12
32 C.F.R. § 286.11(d)(4)(ii) 36
32 C.F.R. § 1285.3(d)(2)(iii)(*c*) 12, 21
40 C.F.R. § 2.201(e) 12
40 C.F.R. § 2.203 36
40 C.F.R. § 2.204(d)(1)(i) 36
41 C.F.R. §§ 60-1.1, *et seq.* 2
41 C.F.R. § 60-1.40 26
41 C.F.R. § 60-2 26
41 C.F.R. § 60-2.13 27
41 C.F.R. Part 60-40 .....18, 19
41 C.F.R. § 60-40.1 20
41 C.F.R. § 60-40.2(a) 18, 20, 21
41 C.F.R. Part 60-60 26
41 C.F.R. § 60-60.4(d) 36
43 C.F.R. § 2.13(h) 36
47 C.F.R. § 0.457(c)(5) 12
49 C.F.R. Part 7 36
49 C.F.R. § 7.67(a)(1) 12

LEGISLATIVE MATERIALS:

H.R. Rep. No. 1441, 94th Cong., 2d Sess. (1976) 32
H.R. Rep. No. 94-880, 94th Cong., 2d Sess., Part I (1976) 32
H.R. Rep. No. 93-876, 93d Cong., 2d Sess. (1974) 39
H.R. Rep. No. 1497, 89th Cong., 2nd Sess. (1966) ...10, 22
S. Rep. No. 93-584, 93d Cong., 2d Sess. (1974) 39
S. Rep. No. 813, 89th Cong., 1st Sess. (1965) 10, 23

Page

26 Cong. Rec. 6893 (June 27, 1894) 15

104 Cong. Rec. 6549-75 (daily ed. April 16, 1958) ...12, 13

120 Cong. Rec. H10870 (daily ed. Nov. 20, 1974) 39

122 Cong. Rec. H7896-98, E4148 (daily ed. July 28, 1976) 32, 33

122 Cong. Rec. E4187-89 (daily ed. July 29, 1976) 33

122 Cong. Rec. S15044, H9260 (daily ed. August 31, 1976) 32

MISCELLANEOUS:

Comment, *The Freedom of Information Act's Privacy Exemption and the Privacy Act of 1964*, 11 Harv. Civ. Rights—Civ. Libs. L. Rev. 596 (1976) 37

K. Davis, *Administrative Law of the Seventies*, § 5.03 (1976) 19

Defense Supply Agency Memorandum DSAH-G, dated 17 December 1974, to Commander, Defense Contract Administration Services Region, Concerning "Release of Contract Compliance Data Under the Freedom of Information Act" 37

Defense Supply Agency Memorandum DSAH-G, 1820-75, AIC 7817, dated 18 Feb. 1975, to Counsel, concerning "Release of Compliance Data Under Freedom of Information Act Amendments" 37

Executive Order 11,246, 30 Fed. Reg. 12,319 (1965), as amended 32 Fed. Reg. 14,302 (1967), 3 C.F.R. § 169, Section 201 ..... 2, 3, 18, 20, 26

Federal Rule of Civil Procedure 26(c)(7) 25

General Accounting Office Report, "The Equal Employment Opportunity Program for Federal Nonconstruction Contractors Can Be Improved," FAO MWD-75-63 (April 29, 1975) 2

Hearings on Business Record Exemption of the Freedom of Information Act Before Government Information and Individual Rights Subcommittee of House Committee on Government Operations, 95th Cong., 1st Sess. (1977) 35

Page

Hearings on S.1666 Before the Subcommittee on Administrative Practice and Procedures of the Senate Committee on the Judiciary, 88th Cong., 1st Sess. 199 (1964) 10

C. Marwick (ed.), *Litigation Under the Amended Federal Freedom of Information Act* (3d ed. 1977) .. 18

1977 Department of Justice Freedom of Information Act Report to Congress (submitted April 18, 1978) 35

Note, *A Review of the Fourth Exemption of the Freedom of Information Act*, 9 Akron L. Rev. 673 (1976) 23

Note, *In Camera Inspections Under the Freedom of Information Act*, 41 U. Chi. L. Rev. 557 (1974) . 24

Note, *The Effect of the 1976 Amendment to Exemption 3 of the Freedom of Information Act*, 76 Colum. L. Rev. 1029 (1976) 30, 33

Note, *Nature of Trade Secrets and Their Protection*, 42 Harv. L. Rev. 254 (1928) 8

Opinion of the Attorney General, 41 Op. Att. Gen. 166 (1953) 15

Opinion of the Attorney General, 41 Op. Att. Gen. 221 (1955) 15, 17

J. O'Reilly, *Federal Information Disclosure*, § 14.01 (1977) 9

O'Reilly, *Government Disclosure of Private Secrets Under the Freedom of Information Act*, 30 Bus. Lawyer 1125 (1975) 24

Patten & Weinstein, *Disclosure of Business Secrets Under the Freedom of Information Act: Suggested Limitations*, 29 Ad. L. Rev. 193 (1977) .. 38

Securities & Exchange Commission Release No. 33-5571, 40 Fed. Reg. 8797 (March 3, 1975) 41

38 Fed. Reg. 3192 (February 2, 1973) 19

Wright & Miller, *Federal Practice & Procedure* § 1350 . 43

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-922

CHRYSLER CORPORATION, *Petitioner*

v.

HAROLD BROWN, et al., *Respondents.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

---

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL

INTEREST OF THE *AMICUS CURIAE*

This brief *amicus curiae* of the Equal Employment Advisory Council ("EEAC") is submitted pursuant to the written consent of all parties.[1] EEAC is a voluntary nonprofit association organized as a corporation under the laws of the District of Columbia to represent and promote the common interest of employers and the general public in the development and implementation of sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices. Its membership comprises a broad segment of the employer community in the United States, including both individual employers and trade and in-

---

[1] Their consents have been filed with the Clerk of the Court.

dustry associations whose employer-members have a common interest in the foregoing purpose. Substantially all of EEAC's members, or their constituents, are employers subject to the provisions of both Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, and Presidential Executive Order 11246, 30 Fed. Reg. 12319 (1965), as amended 32 Fed. Reg. 14302 (1967), 3 C.F.R. § 169.

Pursuant to Executive Order 11246, and regulations promulgated by the Secretary of Labor, 41 C.F.R. §§ 60-1.1, *et seq.*, the petitioner, EEAC members generally and thousands of others [2] are required as government contractors to prepare and either to make available for government inspection or to file with the government Affirmative Action Plans ("AAPs") and Employment Information Reports EEO-1 ("EEO-1 reports"), setting forth very detailed information on present and projected employment and promotions both for the employers' total work force and separately for women and minority group members. Thus EEAC members have a direct interest in the issues presented for the Court's consideration. Of particular concern to EEAC are the questions of the rights of private submitters of information to the federal government to protect their interests in the confidentiality of that data, and of the applicable standards governing disclosure of equal employment opportunity material compiled by private employers but in the possession of government

[2] The Department of Labor has estimated that there are more than 275,000 federal non-construction contractors subject to its Executive Order 11246 and that the number would be even higher if federal construction contractors were included. *See* General Accounting Office Report, "The Equal Employment Opportunity Program for Federal Nonconstruction Contractors Can Be Improved," FAO MWD-75-63 at 31-32 (April 29, 1975).

agencies. EEAC believes that the Court of Appeals' decision would inhibit the successful implementation of the affirmative action program under Executive Order 11246 which requires the voluntary cooperation of private employers.

SUMMARY OF ARGUMENT

I.

The privately generated information at issue in this case includes extremely detailed breakdowns of an employer's work force both by total employees and separately for females and minority groups. Numerous District Courts have found that this information is regarded as private or confidential commercial information by the parties that generate it. These District Courts have also found that public disclosure of such information would create a substantial risk of serious competitive harm to the employer. In some cases, it has been found that, since the data often include not only names, job titles and salaries but also employer evaluations and predictions as to the prospects for promotion, public disclosure would constitute a clearly unwarranted invasion of the privacy of employees.

We believe that the Third Circuit erred in holding that agencies such as OFCCP have virtually unbridled discretion publicly to disclose such data. Both the courts and Congress have long been sensitive to the need to protect private confidential data from public disclosure. Section 1905 of the Criminal Code prohibits disclosure of confidential financial or commercial information except as otherwise "authorized by law."

The Third Circuit erred in finding that disclosure was "authorized by law" for Section 1905 purposes.

The Freedom of Information Act, 5 U.S.C. § 552, does not compel, encourage, or authorize disclosure of information which falls within the exemptions to that Act. Indeed, when it adopted the (b)(4) exemption, Congress intended to "assure" the confidentiality of private commercial information. The Third Circuit also erred in holding that the so-called housekeeping statute, 5 U.S.C. § 301, permits the adoption of regulations that would constitute the requisite "authorized by law" for purposes of the criminal statute. Moreover, since the regulation relied upon by the Third Circuit does not even purport to be adopted pursuant to Section 301, and clearly was intended to be no more than an interpretive statement regarding general agency policy under the Freedom of Information Act, it was error for the Third Circuit to give the regulation substantive significance.

II.

Even if the Third Circuit were correct in its views as to agency authority to disclose, it erred in failing to articulate any standards for the exercise of that discretionary authority. The congressional purpose of protecting the confidentiality of privately generated confidential information must be given considerable weight. The (b)(4) exemption to the FOIA, as well as the (b)(3) and (b)(6) exemptions, are different from those other exemptions which are intended solely for the benefit of government agencies and therefore are subject to ready waiver by those agencies.

Here there is no strong policy consideration weighing in favor of disclosure. Indeed, the nature of the underlying regulatory program militates against disclosure. That regulatory program is dependent to a

considerable degree upon the willingness of employers to engage in critical self-evaluation of their utilization of female and minority group members and to impose upon themselves goals and timetables to achieve more effective utilization of those groups. Indiscriminate public disclosure can only deter harsh self-evaluation, thereby undercutting the voluntary appraisal scheme of the Executive Order.

III.

The Court should recognize that private suppliers of information not only have a cause of action to prevent threatened disclosure but also are entitled to *de novo* determinations on the relevant issues. Agencies by and large have little or no expertise regarding the issues posed by so-called "reverse FOIA" claims. Because agency determinations are made under the stringent time limitations of the FOIA and because suppliers of information frequently have little or no opportunity to participate in those hurried proceedings, the agency rarely, if ever, will compile an adequate record for adjudication of reverse FOIA claims.

ARGUMENT

I. THE RELEVANT STATUTES DICTATE THAT THE GOVERNMENT NOT DISCLOSE, WITH RARE EXCEPTIONS NOT RELEVANT HERE, THE CONFIDENTIAL FINANCIAL AND COMMERCIAL INFORMATION AND TRADE SECRETS OF PRIVATE PARTIES.

The District Court found, on the basis of an evidentiary record which it developed in the course of an adversarial hearing, that the petitioner's information in its AAPs was confidential financial or commercial information within the meaning of 18 U.S.C. § 1905,

and the (b)(4) exemption to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552.[3]

Indeed, the District Court reached this finding even though it adopted the very restricted definition of confidential financial and commercial information for (b)(4) exemption purposes previously articulated by the Court of Appeals for the D.C. Circuit: Not only must there be proof that the information provider treats the data confidentially, there must also be proof that disclosure would either create a serious likelihood of substantial competitive harm or be likely to impair the

[3] 18 U.S.C. § 1905 provides:

> Whoever, being an officer or employee of the United States or any department or agency thereof, publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined not more than $1,000, or imprisoned not more than one year, or both; and shall be removed from office or employment.

Subsection (b) of the FOIA, 5 U.S.C. § 552(b), provides in pertinent part that:

> "(b) This section does not apply to matters that are—
>
> • • •
>
> (3) specifically exempted from disclosure by statute (other than section 552(b) of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;
>
> (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential."

Government's ability to collect such information in the future. 412 F. Supp. at 176; *see National Parks and Conservation Ass'n* v. *Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974).[4]

In reversing, the Third Circuit did not overturn the District Court's findings as clearly erroneous or otherwise improper. Rather, it effectively rendered the District Court's findings superfluous by holding that (1) the executive branch of the Government has broad if not totally unfettered discretion to destroy the confidentiality of information it collects from private parties and (2) the courts may not hear, *de novo*, the claims of private parties that (a) the information which they have supplied to the government falls in the category of confidential financial or commercial information or trade secrets and (b) threatened dis-

[4] The District Court's findings detail various ways in which competitive harm would occur. *See* 412 F. Supp. at 173, 176, 177. Other trial courts after similar evidentiary hearings have made comparable findings of fact, delineating various ways in which competitive harm is likely to occur in the case of other industries. *E.g.*, Westinghouse Electric Corp. v. Schlesinger, 392 F. Supp. 1246 (E.D. Va. 1974), and United States Steel Co. v. Schlesinger, 8 EPD ¶ 9717 (E.D. Va. 1974), *both aff'd*, 542 F.2d 1190 (4th Cir. 1976), *cert. denied*, 431 U.S. 924 (1977). Some courts have also found that disclosure of at least some portions of the AAPs would constitute a "clearly unwarranted invasion of personal privacy" for the contractor's employees within the meaning of Section 552(b)(6). *E.g.*, Metropolitan Life Ins. Co. v. Usery, 426 F. Supp. 150 (D.D.C. 1976), *cert. before judgment denied*, 431 U.S. 924 (1977), *appeal pending sub nom.* National Organization for Women v. Social Security Administration, Nos. 77-1270, *et al.* (D.C. Cir., docketed March 15, 1977). Although that question was apparently not pressed below, the potential for invasion of personal privacy is a factor which should not be overlooked in assessing the soundness of the Third Circuit's broad holding that there is virtually unlimited discretion to release such information to anyone.

closure, under the particular circumstances of any given case, is improper.

We believe the Court of Appeals erred in both its substantive and procedural conclusions. On the substantive level, the Third Circuit simply ignored the long tradition, found in both the common law,[5] and in numerous statutes,[6] of protecting the confidentiality of commercially valuable private information. And while 18 U.S.C. § 1905 contains an exception for disclosure otherwise "authorized by law," the Third Circuit's approach has the effect of turning the exception into the general rule.

A. The Freedom Of Information Act Does Not Authorize Disclosure Of Exempt Information Falling Within Section 1905.

Given the District Court's uncontroverted finding that the information falls within the (b)(4) exemption to the FOIA, that statute provides no basis for an agency decision or regulation that would be "authorized by law" for Section 1905 purposes.

Although the various exemptions to the Freedom of Information Act, *standing alone,* may not necessarily

[5] See, *e.g.*, Board of Trade of City of Chicago v. Christie Grain & Stock Co., 198 U.S. 235 (1905); Peabody v. Norfolk, 98 Mass. 452, 96 Am. Dec. 644 (1868); Note, Nature of Trade Secrets and and Their Protection; 42 Harv. L. Rev. 254 (1928).

[6] *E.g.*, 42 U.S.C. §§ 2000e-5(b), 2000e-8(e) (Equal Employment Opportunity Commission); 13 U.S.C. § 9(a) (Census Bureau); 26 U.S.C. §§ 6103, 7213 (Internal Revenue Service). Of course, since the Office of Federal Contract Compliance Programs ("OFCCP," formerly OFCC) was created by executive order rather than by statute, 18 U.S.C. § 1905 must looked to rather than a statute dealing specifically with the agency in question.

compel nondisclosure,[7] by the same token the FOIA cannot be read as authorizing or even encouraging disclosure of all of the information to which that Act by its own words "does not apply . . . ." 5 U.S.C. § 552(b). While there may be a congressional desire to have the exemptions construed narrowly, there is no congressional policy mandating disclosure of exempt material. The FOIA is at most "neutral" insofar as information to which it "does not apply" is concerned. *Charles River Park "A," Inc.* v. *Department of Housing and Urban Development,* 519 F.2d 935, 942 (D.C. Cir. 1975).

Indeed, the (b)(4) exemption was adopted to continue the long-standing tradition that the confidentiality of competitively sensitive private information should be protected.[8] Congress expected by means of the (b)(4) exemption to "assure" the confidentiality of such information. The House Government Operations Committee Report accompanying the FOIA explained that the (b)(4) exemption

> "would *assure* the confidentiality of information obtained by the Government through questionnaires or through material submitted and disclosures made in procedures such as the mediation of labor-management controversies. It exempts such material if it would not customarily be made public by the person from whom it was obtained by the Government. . . . It would also include information which is given to an agency in confidence,

[7] EPA v. Mink, 410 U.S. 73, 80 (1973). *See also* FAA Administrator v. Robertson, 422 U.S. 225, 262, 269 n.1 (1975); Department of the Air Force v. Rose, 425 U.S. 352, 361 (1976).

[8] *See* J. O'Reilly, Federal Information Disclosure § 14.01 (1977). *See also* Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470 (1974).

since a citizen must be able to confide in his Government. Moreover, where the Government has obligated itself in good faith not to disclose documents or information which it receives, it should be able to honor such obligations." (Emphasis added.)[9]

As a representative of the Justice Department, testifying at hearings on the predecessor of the bill which became the FOIA, put it,

> "not only as a matter of fairness, but *as a matter of right,* and as a matter basic to our free enterprise system, *private business information should be afforded appropriate protection,* at least from competitors." (Emphasis added.)[10]

This legislative history clearly indicates that the expressed concern for the goal of freedom of access to government information was not regarded as inconsistent with or an abridgement upon the traditional policies of protecting the confidentiality of privately generated information. Similarly, Congress strove through the (b)(6) exemption to preserve personal privacy without unnecessarily compromising the basic purpose of the FOIA to ensure openness in Government.[11]

---

[9] H.R. Rep. No. 1497, 89th Cong., ~~1st~~ 2nd Sess. 10 (1966). *See also* S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965).

[10] Hearings on S. 1666 Before the Subcommittee On Administrative Practice and Procedures of the Senate Committee On the Judiciary, 88th Cong., 1st Sess. 199 (1964). *See also id.* at 174; S. Rep. No. 813, *supra,* at 342-43.

[11] *See, e.g.,* S. Rep. No. 813, *supra* at 9 (the (b)(6) exemption "will involve a balancing of interests between the protection of an individual's right of privacy and the preservation of the public's right to Government information"); H.R. Rep. No. 1497, *supra,* at

B. The Third Circuit Erred In Holding That 5 U.S.C. § 301 Authorizes Executive Agencies To Exempt Themselves From The Nondisclosure Policy Of 18 U.S.C. § 1905.

The Third Circuit concluded that 5 U.S.C. § 301,[12] the so-called housekeeping statute, gives Federal agencies the power to overcome the nondisclosure policy of 18 U.S.C. § 1905. This reading of 5 U.S.C. § 301 renders 18 U.S.C. § 1905 meaningless, except in cases involving insubordination within an agency—that is, cases in which an agency employee violates an agency regulation or disregards a superior's *ad hoc* decision not to disclose. At least prior to *Sears, Roebuck & Co.* v. *Eckerd,* 17 FEP Cases 436 (7th Cir., April 25, 1978), which merely follows the decision below and carries it to its logical extreme, there has been no decision either here or by any lower court suggesting that in view of Section 301, 18 U.S.C. § 1905 was designed merely to punish insubordination.

That view is clearly incorrect. Section 301 does not authorize any "disclosure"; rather it provides only for the "custody, use, and preservation" of papers and records. 18 U.S.C. § 1905 applies to *any* officer or employee of the United States, not merely subordinate officers and employees who disobey agency rules or the

---

11 ("Sixth Exemption [excludes] those hundreds of files the disclosure of which might harm the individual"). *See also* Department of the Air Force v. Rose, 425 U.S. 352 (1976).

[12] 5 U.S.C. § 301 provides:

> "The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public."

decisions of their superiors. Numerous agency regulations, some of which have been in existence in one form or another for many years, treat 18 U.S.C. § 1905 as imposing substantive limitations on what the agency may do, not merely penalizing unauthorized deviations from what an agency has decided to do.[13] If Congress cared so little for protecting the confidentiality of privately supplied information that it intended agencies to have carte blanche under Section 301 to destroy that confidentiality, it would make little sense to create a criminal deterrent to violations of confidentiality by agency subordinates. *Cf. Westinghouse Electric Corp.* v. *Schlesinger,* 542 F.2d 1190, 1215 (4th Cir. 1976), *cert. denied,* 431 U.S. 924 (1977).

The legislative history of the most recent amendment of Section 301 indicates that that provision was *not* intended to authorize regulations that would preclude application of Section 1905. In 1958 Congressman Moss was disturbed to find that Section 301, which he perceived as merely "a simple grant of housekeeping authority," had been relied on by several agencies as an independent justification for *withholding* information. To cure this misuse of Section 301, he proposed what ultimately became the statute's second sentence. 104 Cong. Rec. 6549 (daily ed. April 16, 1958).[14] In explaining the limited purpose of his "very simple amendment to a very old statute," Congressman Moss said that his amendment would not affect any other statutory authority which gave an agency the right to withhold information, *id.* at 6549, 6564; that it would merely restore the original intent of Section 301 so that agencies would stop using it as an independent basis for nondisclosure, *id.* at 6550; and, most importantly, that it

> "does not affect the confidential status of information given to the Government and carefully detailed in Title 18, United States Code, section 1905, such as trade secrets, processes, operations, style of work, or apparatus or the identity of confidential statistical data, amount or source of income, profit, loss, or expenditures." *Id.* at 6550.

Believing that broader issues relating to disclosure of information in the hands of the government should receive more thorough consideration at a later time, Congressman Moss successfully opposed all attempts to restrict or expand the scope of the amendment. *See id.* at 6550, 6567-75. He intended only the specific goal of preventing agencies from using Section 301 as an independent grant of authority to control disclosure of information from the public. Congress did not believe that Section 301 authorized *either* release or withholding records, and it acted to clarify the statute on that

---

[13] *See, e.g.,* 29 C.F.R. § 70.21(a) (Department of Labor); 32 C.F.R. § 286.4(b) (Department of Defense); 32 C.F.R. § 1285.3 (d)(2)(iii)(c) (Defense Logistics Agency); 40 C.F.R. § 2.201(e) (Environmental Protection Agency); 47 C.F.R. § 0.457(c)(5) (Federal Communications Commission); 49 C.F.R. § 7.67(a)(1) (Department of Transportation).

[14] At the time Congressman Moss was Chairman of the Special Public Information Subcommittee of the House Committee on Government Operations and was later to be the principal sponsor and leading House advocate of the FOIA as Chairman of the House Government Operations Committee. *See* Ginsburg, Feldman & Bress v. FEA, No. 76-1759 (D.C. Cir., February 14, 1978) Slip Op. at 13 & n.10, (*vacated and reargued en banc,* April 6, 1978), detailing Congressman Moss' expertise on government information matters and his contribution to passage of the FOIA.

latter point because that was the way in which Section 301 was then being misused.[15]

The District of Columbia Circuit correctly concluded in *Charles River Park,* on the basis of a careful analysis of the legislative history, that Section 301 did not authorize regulations that would override the nondisclosure policy of Section 1905.[16] The Third Circuit

---

[15] The legislative history shows that Congressman Moss endorsed the following statement:

> "I believe there is unanimous sentiment in the Government Operations Committee on the following points:
>
> • • •
>
> "2. That . . . [5 U.S.C. § 301] merely authorized department heads to make regulations governing day-to-day operation of the department—a so-called housekeeping function; and that section 161 of the Revised Statutes [*5 U.S.C. § 301*] *was not intended to deal with the authority to release or withhold information or records.*
>
> "3. That departments henceforth should be prevented from relying upon section 161 of the Revised Statutes [5 U.S.C. § 301] as authority for denying access to records or information, but that authority derived from any other sources, such as the Constitution, statutes, or Executive Orders, to withhold information or limit the availability of records would not in any way be affected by the language of H.R. 2767 [the Moss amendment]." *Id.* at 6562 (emphasis and bracketed material added).

[16] 519 F.2d at 942-43. *Accord,* Westinghouse Electric Corp. v. Schlesinger, *supra,* 542 F.2d at 1203; Parkridge Hospital, Inc. v. Blue Cross & Blue Shield of Tennessee, 430 F.Supp. 1093 (E.D. Tenn. 1977); Metropolitan Life Ins. Co. v. Usery, *supra,* 426 F. Supp. at 170; Babcock & Wilcox Co. v. Rumsfeld, 70 F.R.D. 595, 601 (N.D. Ohio 1976); Holiday Inns, Inc. v. Kleppe, 13 FEP Cases 1337, 1339 (W.D. Tenn. 1976). Sears Roebuck & Co. v. Eckerd, 17 FEP Cases 436 (7th Cir., April 25, 1978), and General Dynamics Corp. v. Marshall, 16 FEP Cases 898 (8th Cir., February 14, 1978) rely basically on the Third Circuit opinion in holding that Section 301 authorizes regulations which preclude application of Section 1905. One subsequent lower court decision,

criticizes the *Charles River Park* conclusion, but fails to offer any basis for its contrary assertion that since 1789 Section 301 and its predecessors authorized disclosures otherwise prohibited by Section 1905 and its predecessor statutes. 565 F.2d at 1187. Absent some clear indication that Congress's 1958 perception of Section 301 was wrong, the Third Circuit's assertion must be rejected.

Construing Section 301 as authorizing disclosures that would otherwise be in contravention of 18 U.S.C. § 1905 would also be inconsistent with the FOIA. Section 301 provides no guidelines for the exercise of agency discretion whether or not to disclose. Yet in the FOIA, Congress took the trouble to delineate for government officials and the courts very extensive criteria for differentiating between information subject to mandatory disclosure and information not subject to such disclosure. 18 U.S.C. § 1905, along with most if not all of the other nondisclosure statutes, is cast in rather precise terms as to the type of information involved and

---

Westinghouse Electric Corp. v. Brown, 443 F. Supp. 1225, 1223 n.5 (E.D. Va. 1977), expressly rejects the Third Circuit's view.

The attempt in *Eckerd* to distinguish 41 Op. Att. Gen. 221 (1955) is as unconvincing as is that court's ignoring of 41 Op. Att. Gen. 166 (1953). In both Opinions the Attorney General found it necessary to find some statutory basis other than the general housekeeping statute in order to render the proposed disclosure "authorized by law" for Section 1905 purposes. Furthermore, Senator Aldrich's remark about "poorly paid revenue agents" is misconstrued in *Eckerd.* The Senator's remarks were directed to the dangers of permitting inspection of company records that would expose valuable trade secrets and formulas, not to the scope of the criminal statute which would punish divulging that information once it had fallen into government hands. 26 Cong. Rec. 6893 (June 27, 1894).

how it is to be handled. One must attribute quite irrational conduct on the part of Congress to hold, as the Third Circuit apparently did, that in all or virtually all the statutes relating to disclosure save one—5 U.S.C. § 301—Congress chose to write with a fine point, but that in Section 301 Congress simply was throwing up its hands and allowing agencies free rein to disclose information whenever and wherever they were of a mind to do so.

To support its curious view, the Third Circuit cites only two decisions, both of which it rendered. *Westinghouse Electric Corp.* v. *Nuclear Regulatory Commission,* 555 F.2d 82 (3rd Cir. 1977); *Non-Resident Taxpayers Ass'n* v. *Municipality of Philadelphia,* 478 F.2d 456 (3rd Cir. 1973). The Third Circuit's view in the instant case and in its *Westinghouse* decision seems predicated on the general notion that any valid regulation has the "force of law" and therefore suffices as an "authorized by law" for Section 1905 purposes. This analysis merely obscures the real issue: whether Congress intended by Section 301 to give government officials unfettered discretion to do that which Congress made it a crime for them to do in Section 1905. The view that Congress intended an open-ended delegation of authority for agencies to decide when a criminal statute would apply finds no support in either common sense or in the decisions of this Court.[17] Moreover,

[17] The "authorized by law" exception of Section 1905 and its predecessors has been satisfied only by Congressional statute, the Federal Rules of Civil Procedure, and judicial or quasi-judicial process—never before by an executive pronouncement. *See, e.g.,* Blair v. Oesterlein Co., 275 U.S. 220, 227 (1927) (subpoena of the Board of Tax Appeals requiring Commissioner to answer interrogatories and to furnish tax information concerning several corporations satisfied "authorized by law" exception to predecessor of Section 1905); United States v. Dicke, 268 U.S. 378 (1925) (Section 257(b) of the Revenue Act of June 2, 1924, which directed Commissioner to publicize lists of taxpayers and amount of tax paid, was a "law" within meaning of R.S. § 3167, which prohibited disclosure of tax information in any manner not provided by law); Consumers Union, Inc. v. Cost of Living Council, 491 F.2d 1396 (T.E.C.A.), *cert. denied sub nom.* Business Roundtable v. Consumers Union, 416 U.S. 984 (1974). (Section 205(b)(3) of the Economic Stabilization Act, prohibiting disclosure of proprietary information filed with the CLC by business and authorizing CLC to disclose nonproprietary information, protected CLC from Section 1905 penalties, since Section 1905's application was expressly limited by the Act); Exchange National Bank v. Abramson, 295 F. Supp. 87 (D. Minn. 1969) (information discoverable pursuant to Federal Rules of Civil Procedure not prevented by Section 1905 from being disclosed); Pleasant Hill Bank v. United States, 58 F.R.D. 97 (W.D. Mo. 1973) (any information discoverable under Federal Rules of Civil Procedure cannot be confidential information under Section 1905). 41 Op. Att. Gen. 221 (1955) (Section 1905 does not prevent FCC from providing information to Congress, since Legislative Reorganization Act of 1946 empowers Senate Committee to require the production of documents).

Non-Resident Taxpayers, since it does not even discuss Section 1905, is hardly of much assistance in reaching the goal ought by the court below. *See Charles River Park, supra,* 519 F.2d at 942 n.9.

C. Even If The Third Circuit's Expansive View Of Section 301 Were Sound, The OFCCP's So-called Disclosure Regulations Cannot Constitute The Requisite "Authorized By Law" For Section 1905 Purposes Since Those Regulations Do Not Even Purport To Invoke Section 301 Or To Authorize Disclosure Of Information Within 18 U.S.C. § 1905.

After concluding that Section 301 *could* permit agencies to write regulations that would constitute an "authorized by law" for Section 1905 purposes, the Third Circuit went on to assert, without any supporting analysis, that the OFCCP's disclosure regulations "are valid under § 301." 656 F.2d at 1187-88. This assertion is unjustified.

The OFCCP's so-called disclosure regulations, 41 C.F.R. Part 60-40, cite as their only basis the FOIA and Executive Order 11246. The regulations, moreover, were adopted without notice of proposed rule making and an opportunity for comment pursuant to the APA requirements for the adoption of substantive rules. *See* 5 U.S.C. § 553. The statement of purpose justifies this lack of notice and comment by stating that the regulations "relate solely to interpretive rules, general statements of policy, and to rules of agency procedure and practice," a clear indication that the rules were intended merely to implement the FOIA, not carve out some new substantive rules governing disclosure of information falling outside the scope of the FOIA. Subsection 552(a)(3) provides that

> "each agency, upon any request for records which (A) reasonably describes such records and (B) is made *in accordance with published rules stating the time, place, fees (if any), and procedures to be followed,* shall make the records promptly available to any person." (Emphasis added.)

Pursuant to this statutory directive, roughly 114 separate "agencies" have published regulations describing how they will attempt to implement and apply the FOIA in their respective areas of responsibility.[18] Many of these regulations contain a provision comparable to 41 C.F.R. § 60-40.2(a) upon which the Third Circuit placed such great reliance, reciting an agency intention not to invoke the exemptions from mandatory

[18] For a detailed list of the citations to these various FOIA interpretive regulations, see C. Marwick (ed.), Litigation Under the Amended Federal Freedom of Information Act, App. at 32-34 (3d ed. 1977).

disclosure at each and every opportunity to do so. These promises not to make undue use of the FOIA exemptions—several of which are intended solely for the benefit of the agency and thus obviously within its authority to waive—are a far cry from a deliberate agency decision to invoke an arcane housekeeping statute for the purpose of indiscriminately disclosing confidential information which the agency collects from private parties.

As for the reference to the Executive Order in the statement of purpose, *see* 38 Fed. Reg. 3192 (February 2, 1973), it is no more than a simple mention in passing: No attempt was made to show how the so-called disclosure regulations would effectuate any of the purposes of the Executive Order.[19]

Accordingly, it seems quite clear that 5 U.S.C. § 301 cannot be relied upon as justifying the sweeping significance given to the OFCCP regulations by the Third Circuit. An agency is bound by its own statement of purpose at the time it purports to adopt regulations.[20] Thus even if Section 301 *could* authorize adoption of sweeping disclosure regulations, it cannot be said that the present regulations *were* adopted pursuant to that

[19] Section 201 of the Executive Order grants the Secretary of Labor the power to adopt rules and regulations necessary and appropriate to achieve the purposes of the Order. The reference to the Executive Order in the statement of purpose accompanying the Part 60-40 regulations thus seems clearly to have been intended only as a justification for the particular agency's right to have its rules published in the Federal Register—not as a substantive basis for the actual rules adopted.

[20] *E.g.*, Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168-69 (1962); SEC v. Chenery Corp., 332 U.S. 194, 196 (1946); *see generally* K. Davis, Administrative Law of the Seventies, § 5.03 at 147-48 (1976).

authority. The OFCCP regulations are mere interpretive regulations that do not have the force of law that can only be attributed to valid regulations that are adopted after notice and opportunity for comment.[21]

There are still other problems with attributing the substantive significance to the OFCCP regulations that the Third Circuit attempts to attribute to them. The OFCCP and the Compliance Agencies which report to it operate under authority delegated to them by the Secretary of Labor pursuant to Executive Order 11246. The Department of Labor also has FOIA disclosure regulations, 29 C.F.R. Part 70, which the OFCCP disclosure regulations by their own terms are merely designed to supplement. *See* 41 C.F.R. § 60-40.1. Yet the Department of Labor disclosure regulations specifically forbid release of information within the scope of Section 1905. 29 C.F.R. § 70.21(a). *See Westinghouse Electric Corp.* v. *Schlesinger, supra,* 542 F.2d at 1203 & n. 36. The Department's regulations also make it quite clear that the (b)(4) exemption is for the benefit of private parties, not the agency, and was intended by Congress to *assure* confidentiality, thus giving information within that exemption quite a different character from information within exemptions the agency could freely waive. Moreover, even the OFCCP regulations do not allow disclosure "in the case of records disclosure of which is prohibited by law." 41 C.F.R. § 60-40.2(a).[22]

---

[21] Morton v. Ruiz, 415 U.S. 199, 236 (1974); United States v. Pennsylvania Industrial Chemical Corp., 411 U.S. 655, 674 (1973); Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

[22] The regulations of the Defense Supply Agency (now the Defense Logistics Agency) are also pertinent, particularly since it was the decision of that agency and that agency alone that precipitated the instant case. The DSA regulations, like the Department of Labor's, specifically forbid disclosure of information falling within Section 1905. *See* 32 C.F.R. § 1285.3(d)(2)(iii)(*c*).

In view of these factors, it was erroneous for the Third Circuit to hold that the OFCCP regulations, and particularly 41 C.F.R. § 60-40.2(a), invoke the obscure residual statutory authority the Third Circuit purported to find for overriding 18 U.S.C. § 1905. The mere fact that the OFCCP regulations leave room not to assert every exemption from mandatory disclosure cannot be taken as an expression of agency intent to exercise residual authority to disclose information that traditionally is protected from public disclosure by the government.

II. EVEN IF GOVERNMENT OFFICIALS HAVE SOME RESIDUAL AUTHORITY WHICH PERMITS THEM TO DISCLOSE THE CONFIDENTIAL FINANCIAL AND COMMERCIAL INFORMATION OF PRIVATE PARTIES THAT IS EXEMPT FROM MANDATORY DISCLOSURE, SOME GUIDELINES FOR THE EXERCISE OF THAT AUTHORITY SHOULD BE ARTICULATED.

After holding that the information at issue could be disclosed pursuant to the OFCCP regulations, even though it was exempt from mandatory disclosure under the FOIA pursuant to the (b)(4) exemption, the Third Circuit then left the agency and courts reviewing agency action totally adrift. It simply said that a reviewing court must

> "examine whether the agency considered the proper factors in determining that disclosure was permitted under its own disclosure regulations. Under the OFCC disclosure regulations, for example, the contested information in this case could only be disclosed if that agency determined that

disclosure would 'further the public interest and [not] impede the discharge of any of the functions of the OFCC or the Compliance Agencies.' And, as the FOIA exemptions make clear, disclosure of certain types of information will not, in the opinion of Congress, always be in the public interest." 565 F.2d at 1192 (footnote omitted).

A. The Broad Public Policy Of Protecting The Confidentiality Of Competitively Sensitive Information Must Be Given Considerable Weight.

Accepting *arguendo* the soundness of the curious proposition that the congressional intent or "opinion" to "assure" (see p. 9, *supra*) that confidential private information would remain confidential is entitled to something less than controlling weight, the question still remains what weight is to be given that intent or "opinion." At the very least, it would seem that an agency could not justify discretionary release merely by a conclusory assertion that the public interest warrants disclosure. An agency should be required to articulate specifically the overriding public interest factors that it feels are sufficient to offset the congressional desire to protect confidentiality of business information.

Moreover, the broad public policy in favor of disclosure, reflected in the FOIA, clearly does *not* constitute such an overriding public interest factor where private confidential information is at issue. This is because the disclosure at which the FOIA is aimed is essentially the disclosure of government-generated information: The FOIA "provides the necessary machinery to assure the availability of government information necessary to an informed electorate." H.R. Rep. No. 1497, 89th Cong., 2d Sess. 12 (1966). The Congressional objective was "to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny." *Department of the Air Force* v. *Rose, supra,* 425 U.S. at 361. *See also National Labor Relations Board* v. *Sears, Roebuck & Co.,* 421 U.S. 132 (1975); S. Rep. No. 813, 89th Cong., 1st Sess. (1965). The purpose of the FOIA, in other words, is "to protect the people's right to obtain information about their *government,* to know what their *government* is doing, and to obtain information about *government* activities and policies." Note, *A Review of the Fourth Exemption of the Freedom of Information Act,* 9 Akron L. Rev. 673, 694 (1976) (emphasis added).[23]

The FOIA was never intended as a vehicle by which all information is to be made available to the public and "was not enacted for the purpose of enabling the public to obtain information about what individuals and corporations are doing, or about what their activities and policies are." *Westinghouse Electric Corp.* v. *Schlesinger, supra,* 542 F.2d at 1210 n.64, *quoting* Note, *supra,* 9 Akron L. Rev. at 694. Further, since "the public's interest in confining the breadth of the [FOIA] exemptions is not equally strong for all nine provisions," an important factor bearing on a decision to release exempt information is whether the requested

---

[23] Both the Fourth and Fifth Circuits appear to recognize these important distinctions among the exemptions. *Compare* Continental Oil Co. v. FPC, 519 F.2d 31, 35 (5th Cir. 1975) (rejecting claim of agency discretion to release information within the (b)(4) exemption) *with* Pennzoil Co. v. FPC, 534 F.2d 627, 630 (5th Cir. 1976). *And compare* Westinghouse Electric Corp. v. Schlesinger, *supra,* 542 F.2d at 1197 *with* Charlotte-Mecklenburg v. Perry, 16 FEP Cases 680, at n.15 (4th Cir., January 26, 1978) *and* Westinghouse Electric Corp. v. Brown, *supra,* 443 F. Supp. at 1230.

information relates to "the agency's actions, plans, and policies" as opposed to the "actions, plans, and policies" of private parties. *See Westinghouse Electric Corp.* v. *Schlesinger, supra,* 542 F.2d at 1197; Note, *In Camera Inspections Under the Freedom of Information Act,* 41 U. Chi. L. Rev. 557, 565 (1974).[24]

B. The Character, Purposes And Alternatives Of The Information Requester Have To Be Weighed.

Another important public interest factor would be the demonstrated needs and purposes of the party requesting disclosure. While the FOIA generally entitles any member of the public to access to information as to which disclosure is mandatory, that clearly is not the case where exempt information to which the Act "does not apply" is involved.[25] Obviously when a competitor or possible representative of a competitor is seeking the information, caution in exercising discretion to release

---

[24] As one commentor has put it, there is a

> "philosophical distinction between exemption (4) and Government information generally; the general public has no claim to a business' secret or a financial ledger, as it might to a Government-generated highway map or agency interpretative bulletin . . . [T]here is a significant policy justification for not 'giving away for free' what private industry, *not Government* has paid for. Government's duty to reveal *its* inner workings provides no similar justification for the disclosure of private parties' operations." O'Reilly, *Government Disclosure of Private Secrets Under the Freedom of Information Act,* 30 Bus. Lawyer 1125, 1134 (1975).

[25] Moreover, where the question is whether to release information as to which the FOIA has been found not to apply, there is no reason to impose a ten-day time limit on an agency's decision-making process. Recognition that 5 U.S.C. § 552(a) (6)(A)(i) does not apply to any discretionary release decision would allow more considered development of agency records and, hopefully, more reasoned agency decision-making.

the private, confidential information would be essential. This would also be true where a requestor, although not a competitor, seeks unrestricted access and opportunity to republish, since such access, particularly in these times of the ubiquitous photocopying machine, is likely to result in the information reaching competitors by indirect means.[26]

Another potential requestor, particularly of information of the type at issue here, is the plaintiff or potential plaintiff in an employment discrimination suit. The motives of such requestors may at first blush seem less suspect than those of the requesting competitor. However, the facts that litigants have broad opportunities to obtain information relevant to their claims through pre-trial discovery, and that the courts have considerably greater expertise in fashioning limitations and conditions on disclosure of sensitive information to protect information suppliers from competitive injury or other misuse of the information, weigh heavily against agency disclosure. *Cf.* Fed. R. Civ. P. Rule 26(c)(7).

---

[26] Here too, since the FOIA does not apply where disclosure of exempt information is at issue, there is no bar to agency-imposed limitations or conditions on disclosure such as permitting inspection but not copying. Indeed, when the exempt information is private confidential commercial or financial information, the failure at least to consider something less than unrestricted disclosure would by itself appear to be arbitrary and capricious. But conversely, well-intended conditions on disclosure would not suffice to justify disclosure which would otherwise be imprudent. Unlike a court which retains jurisdiction over litigants to enforce its protective orders, there could be very substantial practical limitations on an agency's ability to enforce conditions which it might place on disclosure, so that great reliance on such conditions to justify disclosure would be arbitrary and capricious.

C. The Impact On The Underlying Regulatory Scheme Must Be Considered.

The Third Circuit seems to endorse the notion articulated in an OFCCP regulation that disclosure of exempt information is proper if disclosure would not "impede the discharge of any of the functions" of the OFCCP. *See* 565 F.2d at 1192. But in view of the congressionally perceived interest in maintaining confidentiality, surely some more positive benefit to agency functions must be found before disclosure can be rationally justified. If, as is conceded, there is a substantial policy factor weighing against disclosure, there must be more than the mere absence of a negative on the other side of the scale. But perhaps in the instant case this distinction is not critical, for it is very difficult indeed to see how the agency, or a court reviewing its action, could possibly conclude that public disclosure of the AAPs and EEO-1s would have any result other than seriously to impede the equal opportunity functions of the agency.

As dictated by Executive Order 11246, OFCCP regulations require government contractors to formulate affirmative action compliance programs, delineating the current work force, the relevant labor availabilities, identifying areas in which the contractor appears to be falling short of the desired ends, and establishing goals and timetables to correct under and over utilization of minorities and females in various job categories. The pertinent regulations are necessarily phrased in general terms and afford contractors significant leeway in setting out their analysis. *See* 41 C.F.R. § 60-1.40; *id.* pt. 60-2. *See also id.* pt. 60-60. Such a regulatory scheme places a premium on candor and critical self-evaluation by contractors in analyzing areas of shortcoming and establishing goals to be met. *See* 41 C.F.R. § 60-2.13. To the extent that contractors are reluctant to be self-critical, the success of the overall program suffers.

The program also depends on a spirit of cooperation and conciliation between the contractor and Compliance Agency. But by opening affirmative action documents otherwise exempt from mandatory disclosure to anyone from the disgruntled employee to the envious competitor and those bent on publicly vilifying the company, the overall objective of affirmative action would be bound to suffer.[27] The government, of course, could still require the compilation of affirmative action plans and attempt to prod contractors into accelerating affirmative action efforts. But clearly the task of government would be more difficult with the inevitable reduction of critical self-evaluation.

Recognizing these very considerations, several district courts have restricted the access of Title VII plaintiffs to affirmative action materials in situations in which an adverse impact on the incentives to self-criticism was apparent. *See Parker* v. *Bell Helicopter Co.*, No. CA 4-75-61 (N.D. Tex., July 12, 1977); *Dickerson* v. *United States Steel Corp.*, 12 E.P.D. ¶ 11,095

---

[27] Even with presumed confidentiality vis-a-vis the outside world, management personnel must be encouraged to identify equal employment opportunity shortcomings within their respective spheres of responsibility. The task of insuring that such personnel are self-critical would be rendered much more difficult if it were feared that the raw data thus developed would be made public without the employer having an opportunity to analyze and explain the data in the context of the safeguards provided by an appropriate enforcement proceeding. *Cf.* International Bro. of Teamsters v. United States, 431 U.S. 324, 340 (1977).

(E.D. Pa. 1976); *Sanday* v. *Carnegie-Mellon University,* 12 FEP Cases 101 (W.D. Pa. 1975); *Banks* v. *Lockheed-Georgia Co.,* 53 F.R.D. 283 (N.D. Ga. 1971). As the court in *Sanday* found,

> "in view of the governmental requirements which foster candid reflection and internal evaluation we firmly believe that such policy determinations, while possibly relevant, should not be made available to party litigants for the simple reason that the primary purpose behind such regulations may be destroyed." 12 FEP Cases at 103 (citation omitted).

Possible jeopardy to a regulatory program that has as its basic goal fulfillment of the deep national commitment to equal employment opportunities cannot be brushed aside on the basis of shibboleths about the broad purposes of the Freedom of Information Act.

III. THE THIRD CIRCUIT ERRED IN CONCLUDING THAT THE DISTRICT COURT CANNOT DETERMINE *DE NOVO* THE APPLICABILITY OF FOIA EXEMPTIONS.

In conformity with all other lower courts considering the question, the Third Circuit found that the private provider of information may bring an action to prevent government disclosure that is threatened in the usual case by way of a response to a third party's FOIA request. The Court of Appeals correctly held that subject matter jurisdiction in these so-called reverse FOIA lawsuits is based upon 28 U.S.C. § 1331. *See* 565 F.2d at 1182; *Califano* v. *Sanders,* 430 U.S. 99 (1977); *Planning Research Corp.* v. *Federal Power Commission,* 555 F.2d 970 (D.C. Cir. 1977); *Sears, Roebuck & Co.* v. *General Services Administration,* 553 F.2d 1378 (D.C. Cir.), *cert. denied,* ——U.S.—— (No. 76-1642, 1977).

Although it concluded that Congress was concerned that "disclosure of certain information might injure interests in privacy or confidentiality which may be as important as the public's right to general access to agency information," that "disclosure of submitter information is qualitatively different from disclosure of data directly relating to government operations," and that the interest in privacy appears "stronger with respect to the former than the latter," 565 F.2d at 1184, the Third Circuit nevertheless found that a provider of information has no right to a judicial determination *de novo* as to whether documents are subject to mandatory disclosure under the FOIA. Instead, the Court of Appeals concluded that the only cause of action an information provider had standing to raise was one for judicial review under the APA, and that the scope of that judicial review is limited to the hurriedly compiled and therefore usually inadequate administrative record [28] as to whether the decision to disclose was arbitrary, capricous or an abuse of discretion. 565 F.2d at 1190-93.

A. The Third Circuit's Doctrinal Justifications For Rejecting A Trial De Novo Are Unpersuasive.

The Third Circuit rejected the notion of a *de novo* determination of the claims of a reverse-FOIA plaintiff on the basis of a tidy but unsound syllogism: there is no implied cause of action for the information provider under the FOIA, because the FOIA exemptions are merely permissive, or under 18 U.S.C. § 1905, be-

---

[28] The FOIA requires that an agency determine within ten working days whether to comply with a request under the Act. 5 U.S.C. § 552(a)(6)(A)(i). Any administrative appeal is to be determined within twenty working days. *Id.* § 552(a)(6)(A)(ii).

cause it is a criminal statute, therefore only the APA provides a cause of action, and the general rule under the APA is that court review is limited to the agency record. The unsoundness of the syllogism is in its premises.

The notion that each of the nine FOIA exemptions is "merely permissive," in the sense that each allows but does not require nondisclosure, is wrong. The (b)(4) exemption, as has been seen, was intended to *assure* nondisclosure of a private party's trade secrets and confidential financial or commercial information. Moreover, the (b)(3) exemption, as amended in 1976, incorporates nondisclosure statutes that either (a) *require* that matters be withheld "in such a manner as to leave no discretion on the issue" or (b) establish criteria for withholding or refer to particular types of matters to be withheld. Certainly the (b)(3) exemption is anything but merely permissive.

Furthermore, although the Third Circuit refused to address the issue, even though it was raised by the parties, 18 U.S.C. § 1905 would seem clearly to be one of the statutes incorporated in the (b)(3) exemption. Section 1905 plainly meets the requirements of both provisos of the (b)(3) exemption.[29] It satisfies the first proviso because it does not provide for any administrative discretion to disclose documents that fall

[29] Since the two provisos of the (b)(3) exemption are clearly disjunctive, a statute to be incorporated by the exemption need only satisfy one proviso or the other. American Jewish Congress v. Kreps, No. 76-1559, Slip Op. at 8 (D.C. Cir., March 15, 1978); Irons v. Gottschalk, 548 F.2d 992, 994 n.3 (D.C. Cir. 1976); Note, The Effect of the 1976 Amendment to Exemption Three of the Freedom of Information Act, 76 Colum. L. Rev. 1029, 1041-42 (1976).

within its scope.[30] Section 1905 also satisfies the second proviso because it specifies the particular types of matters that may not be disclosed, such as trade secrets, processes, operations, confidential statistical data, and so forth.

Several lower court decisions conclude that the (b)(3) exemption incorporates Section 1905.[31] The District of Columbia Circuit, which had initially reached the contrary conclusion,[32] recently re-evaluated its position and declared the issue open in light of the 1976 amendment of Exemption 3.[33] The lower court decisions holding that Section 1905 is not a (b)(3) statute[34] appear to have put misplaced reliance on a

[30] Indeed, since Section 1905 is a criminal statute, it could have no discretionary element. *See* Papachristou v. City of Jacksonville, 405 U.S. 156, 168-69 (1972); Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939).

[31] Westinghouse Electric Corp. v. Schlesinger, *supra*, 542 F.2d at 1199-1203; Holiday Inns, Inc. v. Kleppe, 13 FEP Cases 1337 (W.D. Tenn. 1976); General Dynamics Corp. v. Dunlop, 427 F. Supp. 578 (E.D. Mo. 1976), *rev'd on other grounds sub nom.* General Dynamics Corp. v. Marshall, 16 FEP Cases 898 (8th Cir., February 14, 1978); Babcock & Wilcox Co. v. Rumsfeld, 70 F.R.D. 595, 600 n.8, 601 (N.D. Ohio 1976).

[32] *See* Charles River Park "A", Inc. v. HUD, *supra*, 519 F.2d at 941 n.7.

[33] Sears, Roebuck &Co. v. GSA, *supra*, 553 F.2d at 1385:

> "The threshold issue now is whether § 1905 is within the now more limited group of statutes described by exemption 3. On this the Supreme Court may speak; lacking decisive new guidance by the Supreme Court, the District Court is free to reconsider its view in light of all that has taken place subsequent to its original decision."

[34] Westinghouse Electric Corp. v. Brown, *supra*, 443 F. Supp. at 1232; Metropolitan Life Ins. Co. v. Usery, *supra*, 426 F. Supp. at 158; Crown Central Petroleum Corp. v. Kleppe, 424 F. Supp. 744, 752-53 (D. Md. 1976).

bit of legislative history discussing a quite different (b)(3) amendment from that finally adopted in 1976.[35] Subsequently, the amendment was successively broadened to include statutes that *either* required information to be withheld *or* that permitted withholding but only when such permissive statutes confined the administrator's discretion by giving particular criteria for withholding or by referring to particular types of documents to be withheld.[36] With one clarifying addition in conference, this was the version of the amended exemption finally enacted into law.[37]

Nothing in the legislative history dealing with the final form of the (b)(3) amendment, such as the Conference Report or the floor discussion prior to adoption of the Conference Report,[38] suggests approval of the House Committee on Government Operations' position

---

[35] H.R. Rep. No. 94-880, 94th Cong., 2d Sess., Part I, 23 (1976). At that time the proposed amendment read:

> "(3) required to be withheld from the public by any statute establishing particular criteria or referring to particular types of information."

[36] The version as finally passed by the House read:

> "(3) specifically exempted from disclosure by statute (other than Section 552b of this Title) provided that such statute (A) requires that the matters be withheld from the public, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld." 122 Cong. Rec. H7897 (daily ed. July 28, 1976).

[37] The phrase "in such a manner as to leave no discretion on the issue" was added to clarify the meaning of proviso (A). 122 Cong. Rec. H7896 (daily ed. July 28, 1976); 122 Cong. Rec. H9260 (daily ed. August 31, 1976).

[38] H.R. Rep. No. 1441, 94th Cong., 2d Sess. 14 (1976); 122 Cong. Rec. H9260 (daily ed. Aug. 31, 1976); 122 Cong. Rec. S15044 (daily ed. Aug. 31, 1976).

with respect to Section 1905. Instead, the remarks of the sponsor of the House floor amendment, Congressman McClosky, indicate that the intent was to include within the exemption generally worded, nondiscretionary confidentiality statutes, which he believed had been unwisely excluded by the proposal of the House Committee on Government Operations and even by the House Judiciary Committee version, in addition to discretionary nondisclosure statutes which set out sufficient criteria to guide the administrator's discretion.[39]

If, as seems likely in view of the foregoing analysis, 18 U.S.C. § 1905 is found to be incorporated by reference in the (b)(3) exemption, a civil statute, the Third Circuit's reluctance to find an implied civil cause of action solely on the basis of a criminal statute must diminish in importance.

In any event, the lower court's reliance on the APA to avoid the conceptual problems it perceived with finding a cause of action in any other statute does not produce the intended result. The provision of the APA on which the Third Circuit relied, 5 U.S.C. § 702, gives

---

[39] 122 Cong. Rec. E4187-89 (daily ed. July 29, 1976); 122 Cong. Rec. H7897-98 (daily ed. July 28, 1976), E4148 (daily ed. July 28, 1976). *Accord*, American Jewish Congress v. Kreps, *supra*, Slip Op. at 7-12; Note, The Effect of the 1976 Amendment to Exemption Three of the Freedom of Information Act, 76 Colum. L. Rev. 1029, 1042-43 (1976).

The two statutes listed in the Conference Report as illustrative of statutes not incorporated in the amended Exemption 3 are totally dissimilar to Section 1905. Both Section 1104 of the Federal Aviation Act of 1958, 49 U.S.C. § 1504, and Section 1106 of the Social Security Act, 42 U.S.C. § 1306, give the respective agency broad discretion to make disclosure decisions and do not identify particular types of documents to be withheld or give the administrator any guidance as to how to exercise his discretion to disclose.

standing to seek review to persons suffering a "legal wrong" or who are adversely affected "within the meaning of a relevant statute"; accordingly, there must also be some separate statutory or judicially conferred right beyond Section 702 to justify judicial review.[40] Although the Third Circuit failed to identify that separate legal right, the answer must be found in the FOIA, Section 1905 or some other provision overlooked by the Third Circuit.[41]

B. Doctrinal Niceties Aside, *De Novo* Determinations Of The Claims Of Information Providers As To The Applicability Of FOIA Exemptions Are Both Necessary And Practical.

Limiting the scope of a reverse FOIA lawsuit to a review of the agency's decision based exclusively on the agency record effectively strips private information providers of the protection Congress sought to afford to them through the (b)(4) and (b)(6) exemptions. To be sure, Congress did not specify in the FOIA itself how the confidential commercial and privacy interests identified in those exemptions were to be protected. Perhaps Congress assumed—mistakenly as it

[40] *See, e.g.*, Rasmussen v. United States, 421 F.2d 776 (8th Cir. 1970); Cobb v. Murrell, 386 F.2d 947 (5th Cir. 1967); Braude v. Wirtz, 350 F.2d 702 (9th Cir. 1965); Kansas City Power & Light Co. v. McKay, 225 F.2d 924 (D.C. Cir. 1955).

[41] In reaching its APA conclusion the Court of Appeals appears to have relied entirely on the government's belated assertion that 5 U.S.C. § 702 applied because "a submitter may be '[a] person suffering legal wrong because of agency action . . . within the meaning of a relevant statute.' " 565 F.2d at 1190. The government originally contended that 5 U.S.C. § 701 precluded *any* judicial review of the intended government disclosure, but abandoned that most extreme position after the filing of its brief with the Third Circuit. *Id.* at 1175.

now turns out—that agencies would protect confidential private data and the rights of information submitters as zealously as they defended their own interests and their own data. In any event, Congress did not focus upon the fact that an agency, seeing no interest of its own in protecting the material and faced with the prospect of litigation by the FOIA requester, will often opt to release the material instead of devoting the resources necessary to make a considered, individualized examination of the requested documents and defend a decision to assert the exemption.[42]

[42] The FOIA has placed significant demands on agency resources. *See* Hearings on Business Record Exemption of the Freedom of Information Act Before Government Information and Individual Rights Subcommittee of House Committee on Government Operations, 95th Cong., 1st Sess. 73 (1977) ("1977 House Hearings") (FDA invests 67 person-years and $1.8 million annually in FOIA administration); *id.* at 8 (EPA handled 3,352 FOIA requests in fiscal 1976); 1977 Department of Justice Freedom of Information Act Report to Congress (submitted April 18, 1978) (estimated 1.07 million manhours spent on FOIA and Privacy Act activities at a cost of over $12.95 million).

These demands on the agencies were exacerbated by the 1974 Amendments to the FOIA (which imposed the ten-day deadline for agency decisions on FOIA requests) and coincidentally by a significant 1974 judicial interpretation of the Act that creates significant disincentives to agency vindication of (b)(4) and (b)(6) interests. The evaluation, for example, of a (b)(4) exemption claim, in light of the "substantial competitive injury" test first articulated in National Parks & Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1974), often requires the agency to resolve factual questions in areas where it has little or no expertise.

The 1974 Amendments also directed that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." The lower courts have implemented this provision by requiring detailed explanations on agency implementation of the requirement. *See, e.g.*, Mead Data Central, Inc. v.

In any event, agencies have failed to vindicate the rights accorded private interests by the (b)(4) and (b)(6) exemptions. Thus, private information providers have been forced to initiate judicial action—where they have had a chance to do so[43]—to protect their

---

Department of the Air Force, 556 F.2d 242, 261 (D.C. Cir. 1977), where the lower court allowed that:

> "Certainly these procedures add significantly to the resource costs an agency must bear if it chooses not to disclose material it has in good faith decided is exempt. Those burdens may be avoided at the option of the agency, however, by immediate disclosure. Congress has encouraged the agencies to disclose exempt material for which there is no compelling reason for withholding, and an agency's own balancing of the resource costs of justifying non-disclosure against the value of secrecy may provide a rough estimate of how compelling is its reason for withholding."

The attractiveness of avoiding these procedures by disclosure in (b)(4) and (b)(6) situations, where the agency perceives no interests of its own in withholding, is obvious.

[43] An information provider's ability to take timely action to protect its rights is often difficult since the FOIA contains no provision that a submitter receive notice from an agency before its documents are disclosed. While a few agencies do provide for notice to submitters in their regulations implementing the FOIA, *e.g.*, 32 C.F.R. § 286.11(d)(4)(ii) (Department of Defense), a significant number of agencies do not. *See, e.g.*, 28 C.F.R. Part 16 (Department of Justice); 24 C.F.R. Part 15 (Department of Housing and Urban Development); 49 C.F.R. Part 7 (Department of Transportation); 31 C.F.R. Part 7 (Treasury Department); 5 C.F.R. Part 294 (Civil Service Commission). Other agencies only provide notice in what they consider to be close questions on the applicability of the (b)(4) exemption or when it is administratively feasible to do so. *See, e.g.*, 40 C.F.R. § 2.203 and 2.204(d)(1)(i) (Environmental Protection Agency); 43 C.F.R. § 2.13(h) (Department of Interior); 21 C.F.R. § 4.45 (Food and Drug Administration). The OFCCP does not provide notice but directs that a government contractor must demonstrate at the time the government takes possession of the documents why the information is not subject to disclosure pursuant to the FOIA. 41 C.F.R. § 60-60.4(d). Yet, some Compliance Agencies do not follow this regulation and refuse to permit government contractors to make a showing of confidentiality at the time documents are submitted to the agency. The Defense Supply Agency, the Compliance Agency involved in this case, has taken this approach, claiming that review of a confidentiality claim at the time of document submission is too burdensome administratively. Defense Supply Agency Memorandum DSAH-G, dated 17 December 1974, to Commander Defense Contract Administration Services Region, concerning "Release of Contract Compliance Data Under the Freedom of Information Act." J.A. 973-76. Moreover, the DSA has also directed it would not delay disclosure because a contractor wished to contest a decision at the time of the request. Defense Supply Agency Memorandum DSAH-G, 1820-75, AIC 7817, dated 18 Feb. 1975, to Counsel, concerning "Release of Compliance Data Under Freedom of Information Act Amendments." J.A. 977-78.

interests." The Third Circuit, however, by limiting the information provider to whatever agency record that may have been compiled, makes it virtually impossible

---

[44] To be sure, Congress has attempted to protect personal privacy further by enactment of the Privacy Act of 1974. 5 U.S.C. § 552a (Supp. 1976). That Act, however, protects only information that is retrievable by an individual's name or other identifying characteristic. *See* 5 U.S.C. § 552a(a)(5) and § 552a(b). Consequently, the reverse FOIA lawsuit is the only available judicial remedy for many types of information protected by the (b)(6) exemption. AAPs, for example, often include information concerning individual employees' salaries, evaluations of work performance, prospects for promotions and other subjects, disclosure of which would constitute a clearly unwarranted invasion of personal privacy. Metropolitan Life Ins. Co. v. Usery, *supra;* Sea-Land Service, Inc. v. Morton, 11 EPD ¶ 10,792 (D.D.C. 1976); Hughes Aircraft Co. v. Schlesinger, 384 F. Supp. 292 (C.D. Cal. 1974), *appeal pending* No. 75-1064 (9th Cir.). The lower courts have uniformly permitted a corporate supplier of information to assert the privacy interests of its employees. *See* Sears, Roebuck & Co. v. GSA, 553 F.2d 1378 (D.C. Cir.), *cert. denied*, —— U.S. —— (No. 76-1642, 1977); Westinghouse Electric Corp. v. Brown, *supra;* Metropolitan Life Ins. Co. v. Usery, *supra;* Sea-Land Service, Inc. v. Morton, *supra;* Hughes Aircraft Co. v. Schlesinger, *supra; cf.*, Robertson v. Department of Defense, 402 F. Supp. 1342 (D.D.C. 1975); *accord,* Comment, The Freedom of Information Act's Privacy Exemption and the Privacy Act of 1964, 11 Harv. Civ. Rights-Civ. Libs L. Rev. 596, 620 n.110 (1976).

to vindicate the rights which the (b)(4) and (b)(6) exemptions are intended to protect.

The deference traditionally accorded to administrative decision-making grows out of a presumption that agencies charged with the administration of particular regulatory programs possess greater expertise to adjudicate the relevant issues involved than a court of general jurisdiction. *See e.g., Federal Power Commission* v. *Florida Power & Light Co.*, 404 U.S. 453 (1972); *Federal Trade Commission* v. *Motion Picture Advertising Service Co.*, 344 U.S. 392 (1953); *Interstate Commerce Commission* v. *Mechling*, 330 U.S. 567 (1947). That presumption does not apply in a reverse FOIA situation. There is rarely any agency expertise in the determination of whether disclosure of privately submitted information might afflict substantial competitive harm on the information provider; agency officials themselves recognize their inability to determine effectively claims of competitive injury.[45] Thus, even

[45] As an Environmental Protection Agency official has described the problem to Congress,

> [the substantial competitive harm test] is a factual determination, as well as a legal one, and it calls on the Agency to make prospective judgment. As I noted above, however, the Agency seldom has much information with which to make this judgment. EPA does receive the substantiation from the affected business in which the business makes its case as to whether there would be substantial competitive harm and what the harm would be. But EPA is at a disadvantage because it cannot test the validity of the business' assertions without specialized knowledge of the business or the particular industry. This is information that EPA seldom has. 1977 House Hearings at 5.

Support for the "substantial competitive harm" test appears lacking from the legislative history of the (b)(4) exemption. *See* notes 8-10 *supra* and accompanying text; Patten & Weinstein, Disclosure of Business Secrets Under the Freedom of Information Act: Suggested Limitations, 29 Ad. L. Rev. 193, 195-98 (1977).

without the disincentives to agency vindication of (b)(4) rights noted above, agencies do not possess any particular expertise to decide the factual and legal issues involved.

The inadequacy of procedure contemplated by the Third Circuit is underscored by the fact that the compilation of the agency record is limited to the ten-day period imposed by the FOIA upon the agency to respond to an FOIA request. 5 U.S.C. § 552(a)(6)(A)(i). The ten-day limit was imposed by Congress in 1974 because agencies were conducting in response to the FOIA "stubborn, protracted trench warfare, yielding nothing except under compulsion." 120 Cong. Rec. H10870 (daily ed. Nov. 20, 1974) (remarks of Cong. Aspin); *see* H.R.Rep. No. 93-876, 93d Cong., 2d Sess. 6 (1974) ("information is often useful only if it is timely"); S. Rep. No. 93-584, 93d Cong., 2d Sess. 3 (1974) (discussing "delays of epidemic proportion"). While the ten-day limitation puts an end to administrative intransigence, or ought to, it also imposes a virtually insurmountable burden on the information provider (even if notice of the FOIA request is received within the ten-day period to present to the agency the case for nondisclosure), and on the agency to make its determination within ten days. Of course, at the time of the 1974 Amendments to the FOIA, the additional burdens which the (b)(4) exemption test announced in the *National Parks* decision imposed on

Of course, if it were determined that 18 U.S.C. § 1905 is incorporated in the (b)(3) exemption, the issues would be simplified; it would only be necessary to show that the data are of the type that Section 1905 protects. But even with respect to this simpler inquiry few if any agencies can claim expertise as to whether the information is treated as confidential by the supplier.

the agencies were not yet fully appreciated. But now, as one witness at recent Congressional oversight hearings put it:

> "It is virtually impossible to think of a procedure whereby everyone's views could be obtained and an agency determination reached within ten days." 1977 House Hearings at 41 (Statement of Professor Nancy Duff Campbell).

Quite simply, the agencies have been unable to discharge their obligations properly under these procedures. For example, the EPA admitted at the 1977 House Hearings that the ten-day limit provided no time to evaluate the issues in a (b)(4) situation and thus it automatically issued an initial denial to the FOIA requester whenever a possibility existed that (b)(4) material was involved. 1977 House Hearings at 4. In the instant case, the agency decided that the ten-day limit overrode Chrysler's right (contemplated by the OFCCP's own regulations) to an administrative review of the initial decision to release the data at issue. (J.A. 992-93.) Perhaps the most candid agency assessment on the impact the ten-day limit has on the rights of information submitters was made by the Securities and Exchange Commission in altering its FOIA regulations:

> "The Commission regrets that in many cases the Commission will disclose records although persons who cooperated in its investigation would have reasonable grounds to object, either because of personal privacy or business secrecy considerations. But the stringent time requirements under the Freedom of Information Act, as amended, as well as the heavy financial and manpower burden that the Commission would be obliged to sustain if it were to attempt to examine each individual record for these purposes, will generally prevent the Commission from refusing to make disclosure on these bases." SEC Release No. 33-5571, 40 Fed. Reg. 8797, 8799 (March 3, 1975).

Further, the FOIA does not require agency findings or even that the agency consider the information provider's submission. Coupled with the ten-day limits, these factors virtually insure that there will be little, if any, administrative record to review by the court.

The inability of agencies to deal meaningfully with the complex legal and related factual issues posed by reverse FOIA claims is illustrated by the Third Circuit's decision itself.[46] While wishing to restrict review to the administrative record, the Third Circuit felt compelled to admit that the

> "agency record is so ambiguous that it is impossible to determine whether the decision of DSA to disclose the contested information is mandated by the FOIA or is in the public interest and thus permissible under that agency's own disclosure regulations." 565 F.2d at 1192.

---

[46] The Third Circuit's decision appears to have been partially motivated by a desire to relieve the perceived burdens of the reverse FOIA cases from the courts. Yet the Court of Appeals' rejection of *de novo* review will not reduce the reverse FOIA caseload at all, since APA review remains available. Moreover, when removed from the ten-day deadline from request to decision, a (b)(4) claim will not require an inordinate devotion of judicial resources. The typical FOIA (b)(4) case has proven relatively straightforward and of short duration. Even under the "substantial competitive harm" test, the lower courts have recognized that "detailed economic evidence" is not required, that "no actual adverse effect on competition need be shown," and that the decision on mandatory disclosure could be based "at least in part on relevant and credible opinion testimony." National Parks & Conservation Ass'n v. Kleppe, 547 F.2d 673, 681, 683 (D.C. Cir. 1976).

It also saw the need to remind District Courts of the responsibility for *pendente lite* intervention under 5 U.S.C. § 705 which would necessarily entail mini-reverse FOIA trials, presumably *de novo* in view of the *absence* at that time of a completed record.

The Eighth Circuit, in following the Third Circuit's approach, also had to find the agency record inadequate in that it failed to disclose the bases for various determinations so that the agency's disclosure decision could not be sustained. *General Dynamics Corp.* v. *Marshall,* 16 FEP Cases 898 (8th Cir., February 14, 1978). Clearly the inevitable result of the Third Circuit's approach will be the practical impossibility for an agency to compile a record and make a determination within the ten-day period which can withstand even the judicial review the Court of Appeals contemplates.

In contrast to the Third Circuit's approach, the District of Columbia and Fourth Circuit have effectuated the congressional protections of the (b)(4) and (b)(6) exemptions by providing for *de novo* judicial consideration of the mandatory disclosure issue. In *Charles River Park "A", Inc.* v. *Department of Housing and Urban Development, supra,* 519 F.2d at 940 & n.4, the Court of Appeals directed the District Court to hold an evidentiary hearing and determine *de novo* whether the information in question fell within the (b)(4) exemption. The D.C. Circuit recognized that this hearing "would not be a *de novo* evidentiary hearing on the facts constituting the basis for the agency's decision. Such a hearing would not, of course, be appropriate under *Camp* v. *Pitts,* 411 U.S. 138, 93 S. Ct. 1241, 36 L. Ed. 106 (1973)." Instead the D.C. Circuit said

> "A plaintiff in a suit such as this is obviously entitled to no relief if the government could be forced to disclose the information it wishes to reveal in a suit under the FOIA. Thus, the district court should hold a hearing to determine whether the information involved here would have been exempt just as it would if a suit had been brought under the FOIA to compel disclosure. *See* 5 U.S.C. § 552(b)(3); *National Parks and Conservation Association* v. *Morton* [498 F.2d 765 (D.C. Cir. 1974)]. In holding this hearing the district court is not reviewing agency actions; it is making a threshold determination whether the plaintiff has any cause of action at all." 519 F.2d at 940-41 n.4.

See also Sears, Roebuck & Co. v. *General Services Administration, supra,* 533 at 1380-81; *Planning Research Corp* v. *Federal Power Commission, supra,* 555 F.2d at 977 n.17.[47]

The Fourth Circuit, recognizing the disincentives to agency protection of submitter rights and the lack of agency expertise in this area, has implied a *de novo* cause of action under the (b)(4) exemption to the FOIA on a somewhat different but no less sound basis:

> "Moreover, there is always the real risk that the agency itself will be delinquent in asserting the rights of the private party. After all, it could not care less about protecting the competitive position of a supplier of information. That is no part of its responsibility. Neither does it have, as has already been observed, in most instances, sufficient knowledge to assert properly the private party's right

---

[47] Just as a court always reserves the right to determine *de novo* the facts relevant to subject matter jurisdiction, *see* Wright & Miller, Federal Practice & Procedure, § 1350, the D.C. Circuit's approach to the instant problem is consistent with the norms of judicial oversight of administrative action.

to confidentiality. And it must not be forgotten that the protection of a competitive position is both a valuable and often complex matter, dependent upon full proof, and one 'basic to our free enterprise system.' Should not the person who is threatened with harm through a disclosure, which the Congress has indicated clearly is against the public policy as expressed in the FOIA itself, be the proper one to assert that right to protection from disclosure assured him under Exemption 4, in an equity action in which he can have a *de novo* trial? The envious competitor or the curious busybody demanding access to that private information has the right to such a *de novo* trial. The Act gives it to him. But is not the same right to be implied, when the supplier, with a right that Congress gave him 'not only as a matter of fairness but as a matter of right,' seeks what may be regarded as a correlative relief?' " *Westinghouse Electric Corp.* v. *Schlesinger*, 542 F.2d 1190, *supra*, at 1213 (footnote omitted).[48]

The decisions of the Fourth and District of Columbia Circuits implying a private cause of action under the FOIA are not at odds with the factors delineated in *Cort* v. *Ash*, 422 U.S. 66, 78 (1975), relevant to the determination whether a private remedy is implicit in a statute not expressly providing one.[49] The FOIA

[48] Several District Courts in still other circuits have also found that a *de novo* inquiry is appropriate in reverse FOIA cases. *See* Sonderegger v. Dep't of the Interior, 424 F. Supp. 847 (D. Idaho 1976); Hughes Aircraft Co. v. Schlesinger, 384 F. Supp. 292 (C.D. Cal. 1974), *appeal pending*, No. 75-1064 (9th Cir.).

[49] In *Cort* v. *Ash* the Court explained that:

> "In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, is the plaintiff 'one of the class for whose *especial* benefit the statute was enacted,' Texas & Pacific R. Co. v. Rigsby, 241 U.S. 33, 39 (1916) (emphasis supplied)—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? *See, e.g.*, National Railroad Passenger Corp. v. National Ass'n of Railroad Passengers, 414 U.S. 453, 458, 460 (1974) (Amtrak). Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? *See e.g.*, Amtrak, *supra:* Securities Investor Protection Corp. v. Barbour, 421 U.S. 412, 423 (1975); Calhoon v. Harvey, 379 U.S. 134 (1964). And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?" 422 U.S. at 78.

We do not believe the Court has ever indicated that total compliance with each of these standards is a prerequisite to implying a private cause of action; they are rather a series of factors to be considered together.

[50] The Seventh Circuit has recently reached a contrary conclusion in determining whether an implied cause of action under the FOIA meets the *Cort* v. *Ash* test. Sears, Roebuck & Co. v. Eckerd, 17 FEP Cases 436 (7th Cir., April 25, 1978). That analysis errs

exemptions are not "bare criminal statutes." *Id.* at 80. The information submitter is certainly one of the class for whose especial benefit the (b)(4) and (b)(6) exemptions were enacted. While, as explained above, there is little indication of legislative intent to create a private action, there is no indication of legislative intent, explicit or implicit, to deny a private remedy. However, it is consistent with the purpose of the (b)(4) and (b)(6) exemptions to imply a private cause of action for the information provider; and it is essential to do so if any meaningful protection is to be accorded the confidentiality interests of the information provider. Finally, a cause of action seeking a determination that private data in the possession of a federal agency are not subject to mandatory disclosure pursuant to the FOIA is certainly not one traditionally relegated to state law.[50]

Hence, the Third Circuit's holding on *de novo* review should be reversed.[51] A private information submitter should be afforded a *de novo* judicial determination whether his or her data are subject to mandatory disclosure under the FOIA.

---

on two counts—(1) by ignoring that the FOIA and its exemptions represent a balancing of interests and not a desire for wholesale disclosure of every scrap of paper in the Government's possession and (2) by an unrealistic reliance on the adequacy of limited APA review to protect the rights of the information submitter.

[51] The Third Circuit placed significant reliance in reaching its conclusion that *de novo* review was not available on its view that the FOIA exemptions were permissive, not mandatory, 565 F.2d at 1184-86. Yet the D.C. Circuit, while viewing the exemptions as permissive, has consistently ruled that a *de novo* judicial determination on the mandatory disclosure issue is available. *See, e.g.*, Sears, Roebuck & Co. v. GSA, *supra;* Charles River Park "A", Inc. v. HUD, *supra*. Thus, a mandatory-permissive dichotomy provides no legal basis to abridge the right of a private submitter to have the exemptions enacted for his protection applied correctly to information in which he has confidential commercial or privacy interests.

CONCLUSION

For the reasons stated, the Third Circuit decision should be reversed and remanded with instructions to affirm the decision of the District Court.

Respectfully submitted,

MICHAEL S. HORNE
BRUCE D. SOKLER
STEPHEN R. MYSLIWIEC

COVINGTON & BURLING
888 Sixteenth Street, N.W.
Washington, D.C. 20006

Attorneys for Amicus Curiae, The Equal Employment Advisory Council

Of Counsel:

ROBERT E. WILLIAMS
DOUGLAS S. MCDOWELL
MCGUINESS & WILLIAMS
1747 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

June, 1978

Supreme Court, U. S.
FILED
JUN 6 1978
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1977

No. 77-922

CHRYSLER CORPORATION,

Petitioner,

vs.

HAROLD BROWN, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF *AMICI CURIAE* FOR SCIENTISTS & ENGINEERS FOR SECURE ENERGY, THE COMMITTEE ON ACADEMIC NONDISCRIMINATION AND INTEGRITY, AND MID-ATLANTIC LEGAL FOUNDATION

LEONARD J. THEBERGE
Attorney for the Amici Curiae
1101 17th Street N.W.
Suite 810
Washington, D. C. 20036
(202) 296-1683

EDWARD H. DOWD
MYRNA P. FIELD
Of Counsel

973 LUTZ APPELLATE PRINTERS, INC.
Law and Financial Printing
South River, N.J. (201) 257-6850 | New York, N.Y. (212) 840-9494 | Philadelphia, Pa. (215) 563-5587 | Washington, D.C. (202) 783-7288

TABLE OF CONTENTS

Page

Interests of the *Amici Curiae* 1

Summary of Argument 7

Argument:

I. The Freedom of Information Act protects from disclosure unlicensed and unpatented scientific information submitted to the federal government in confidence. 8

II. Agency personnel have no substantial interest in refusing to disclose information requested under the Freedom of Information Act. 14

III. Trial *de novo* is the only effective protection for submitters of confidential information of which disclosure is sought by a Freedom of Information Act request. 17

Conclusion 19

TABLE OF CITATIONS

Cases Cited:

Continental Oil Co. v. Federal Power Com'n., 519 F. 2d 31 (5th Cir. 1975) 14

Chrysler Corp. v. Schlesinger, 565 F.2d 1172 (3d Cir. 1977) 13, 15, 16, 19

FAA Administrator v. Robinson, 422 U.S. 255 (1975) 10

Contents

Page

Instrument Systems Corp. v. United States, 546 F.2d 357 (Ct. Cl. 1976) 14

Mead Data Cent. Inc. v. United States Dept. of Air Force, 556 F.2d 242 (D.C. Cir. 1977) 17

National Parks and Conservation Ass'n. v. Kleppe, 547 F.2d 673 (D.C. Cir. 1976) 10

Renegotiation Board v. Bannercraft Co., 415 U.S. 1 (1974) 17

Rural Housing Alliance v. United States Dept. of Agr., 498 F.2d 73 (D.C. Cir. 1974) 10

Sears Roebuck & Co. v. General Services Admin., 553 F.2d 1378 (D.C. Cir. 1977), cert denied, ___ U.S. ___ (1977) 17

Union Oil Company of California v. Federal Power Com'n., 542 F.2d 1036 (9th Cir. 1976) 14

Westinghouse Elec. Corp. v. Schlesinger, 542 F.2d 1190 (4th Cir. 1976), cert. denied sub. nom. Brown v. Westinghouse Elec. Corp., 431 U.S. 924 (1977) 14, 16, 17

Westchester Gen. Hosp. Inc. v. Dept. of H.E.W., 434 F. Supp. 435 (M.D. Fla. 1977) 11

Statutes Cited:

Freedom of Information Act:

5 U.S.C. §552(b) 8

Contents

Page

5 U.S.C. §552(b)(4) 9

18 U.S.C. §1905 16

Rule and Regulation Cited:

Supreme Court Rule 42 1

41 C.F.R. §60-40.2(a) 15

Other Authorities Cited:

H. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966) 9

S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965) 9

Attorney-General's Memorandum of the Public Information Section of the Administrative Procedure Act, 20 Ad. L. R. 263 (1967) 9

Developments under the Freedom of Information Act—1974, 1975 Duke L.J. 416 (1975) 11

Note, Would Macy's Tell Gimbels: Government-Controlled Business Information and the Freedom of Information Act, Forward and Backwards, 6 Loy. Chi. L. J. 594 (1975) 12, 15

O'Reilly, Government Disclosure of Private Secrets under the Freedom of Information Act, 30 Bus. Law. 1125 (1974-5) 12, 15

In The

Supreme Court of the United States

October Term, 1977

No. 77-922

CHRYSLER CORPORATION,

Petitioner,

vs.

HAROLD BROWN, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF *AMICI CURIAE* FOR SCIENTISTS & ENGINEERS FOR SECURE ENERGY, THE COMMITTEE ON ACADEMIC NONDISCRIMINATION AND INTEGRITY, AND MID-ATLANTIC LEGAL FOUNDATION

INTERESTS OF THE *AMICI CURIAE*

Pursuant to this Court's Rule 42, Scientists and Engineers for Secure Energy ("Scientists and Engineers"), the Committee on Academic Nondiscrimination and Integrity ("Committee"), and Mid-Atlantic Legal Foundation ("Mid-Atlantic") hereby move the Court for leave to file the attached brief as an *amici curiae*. Consent was secured from counsel for both parties. Copies of these letters have been filed with the Clerk.

These three organizations have an interest in the disposition of the case which is now before this Court pursuant to the writ of certiorari to the judgment and opinion of the United States Court of Appeals for the Third Circuit in *Chrysler Corporation v. Brown et al.*, 565 F. 2d 1132 (3rd Cir. 1977) based upon the expertise and purposes of their membership. The brief urges the Court to reverse the judgment of the court below.

Scientists and Engineers for Secure Energy is a national group of scholars and professional researchers who organized in 1976 to monitor and influence events occurring in energy and technology related fields. It has devoted its resources to decreasing the proliferation of administrative and litigative obstacles to effective development and implementation of science and technology for the benefit of our society. Scientists and Engineers has presented comments to the Nuclear Regulatory Commission and committees of Congress; petitioned the Third Circuit; and appeared as an *amicus* before this Court.

It has a membership of approximately 300 which includes the following especially well-recognized scientists: Hans A. Bethe,* Felix Bloch,* Robert Hofstadter,* W.F. Libby,* Robert S. Mulliken,* James Rainwater,* Frederick Seitz, Edward Teller, James A. Van Allen, and Eugene Wigner.*

The professional activities of the members of Scientists and Engineers engage them in the scholarly research leading to the development of proposals, operating hypotheses and the establishment of designs and prototypes. In addition, they are called upon to supervise the construction of scientific and other machines based upon theoretical as well as practical elements and procedures. Several of its members hold patents which have considerable commercial value including those relating to nuclear reactors.

---

* Nobel Laureates

Research endeavors have traditionally been partially supported by industries and government agencies interested in the advancement of particular branches of science and technology. Government-university cooperation has a long respected tradition; one need only remember the famous Michelson-Morley experiments in 1887 which formed the basis of Einstein's relativity theories and were funded by the United States Navy. This interaction has accelerated since World War II.

A new element has recently entered the government-university partnership. For reasons frequently unrelated to the purposes of funding itself, the federal government has used its contractual powers to demand various and extended amounts of information from scientific laboratories and the universities in which the membership of Scientists and Engineers teach and work. In the past, this information was assumed to be confidential since a premature disclosure could harm the individual researcher, his laboratory, and the school with which the former was associated. The advent of the Freedom of Information Act stimulated individuals and groups to request disclosure of such information and the appearance of contradictory rulings by various courts about the meanings and protections afforded by this statute has impelled Scientists and Engineers to feel that they have an interest in the current proceedings before the Court and to believe that there is a considerable urgency for clarification of the present, alternative interpretations to accord with the position presented herein.

The Committee on Academic Nondiscrimination and Integrity ("Committee") is a national group organized in 1972 by faculty members of American colleges and universities, public and private. The development of administrative practices relating to university admission and employment standards which these persons felt were in opposition to federal and state legislation relating to civil rights, current educational practices, and the equal protection provisions of the United States

Constitution stimulated its organization. The Committee has emerged from the University Center for Rational Alternatives, an organization of concerned scholars and teachers, which since its inception in 1968 has worked to re-establish tranquillity on American campuses and to strengthen rational discourse as the most respected and effective means of education. During its existence, the Committee on Academic Nondiscrimination and Integrity has united a representative cross-section of faculty members from colleges and universities across the country. Its steering committee members include Bruno Bettelheim, Paula Sutter Fichtner, Nathan Glazer, Oscar Handlin, Sidney Hook, Eric Isaac, Eugene Rostow, Paul Seabury, Miro Todorovich and L. Pearce Williams.

Through its extended membership, the Committee has gathered additional information concerning the spread of government regulations affecting institutions of higher learning which impair the effectiveness and the integrity of the educational process. These materials were subsequently used to analyze trends and formulate positions which the Committee has advanced in presentations to various government departments and agencies. Representatives have also testified at congressional hearings, agency hearings as well as at local university administration meetings and before the United States Commission on Civil Rights.

The Committee is concerned by the continuing erosion of constitutionally guaranteed rights and has filed briefs as *amicus* in a number of significant cases including *Cramer v. Virginia Commonwealth University, DeLeo v. Regents of the University of Colorado,* and *Regents of the University of California v. Bakke.* In each instance, the position of the Committee has supported the rights of individuals.

Recently, the Committee has observed various departments and commissions of the federal government substantially increase their requests for data concerning personnel practices at

the universities and laboratories where they are employed. Letters of recommendation or evaluations contained within the personnel files of faculty members are among the documents which are sought.

In the past, this information was viewed as confidential and exempt from later disclosure by the recipient agency. Recently issues have been raised concerning the efficiency of confidentiality protections embodied in existent statutes. Specifically, as the Solicitor General of the United States asks in his response to the petition for a writ of certiorari, "whether federal agencies may elect by regulation to disclose information that is exempt from mandatory disclosure under the Freedom of Information Act . . .?" This issue is essential to the Committee. Its members are disturbed by the weakening of the protections afforded by the exemptions from disclosure sections of the Freedom of Information Act. It is their hope that the Court will elect to strengthen the protection of individuals in accord with the position taken in this brief.

Mid-Atlantic Legal Foundation was organized in 1976 as a Pennsylvania not-for-profit corporation to engage in nonpartisan legal research, study and analysis, for the benefit of the general public of the effects of the evolving concepts of law on our democratic institutions and to provide legal representation and to assist other organizations in providing legal representation on matters of public interest at all levels of the judicial process.

Mid-Atlantic Legal Foundation takes special interest in questions of law of a national scope that have a direct effect on the mid-Atlantic region: namely, Pennsylvania, New York, New Jersey, Maryland, Delaware and West Virginia. Because of the large number of educational and research institutions functioning within its geographic area, the issues presented herein are of special interest to the community represented by the foundation.

As explained, these groups have an interest in this case because the decision of the Third Circuit has interpreted the Freedom of Information Act, as amended, in a manner which will have far-reaching effects on their daily activities. It is anticipated that an adverse effect on the nature and amount of information voluntarily submitted to the federal government by persons who formally cooperated fully with all requirements will be manifested immediately. In turn, deleterious effects upon the general public based upon the utilization of incomplete information on which the government will predicate its regulatory functions is anticipated. The modification by judicial decisions of the confidential and personal information exemptions of the Freedom of Information Act, as amended, coupled with the growth of controlling, individualized departmental regulations has permitted the courts to erode the confidence formerly assured to the academic and scientific communities by it. Technical and scientific groups may elect to evade reluctantly the requirements of reporting by presenting only those portions of their research which are already general public information.

Scientists and Engineers, the Committee, and Mid-Atlantic Legal Foundation have carefully reviewed the petition for a writ of certiorari and the related briefs of the petitioner, Chrysler Corporation, and the respondent, Brown, and respectfully submit that the brief lodged herein presents an analysis of problems related to the issues before the Court which were not presented by the parties on consideration of the petition for a writ of certiorari. It is, therefore, believed that these considerations will not otherwise be presented to the Court although they are significant to the disposition of this case.

SUMMARY OF THE ARGUMENT

The Court of Appeals for the Third Circuit has held that the Freedom of Information Act exemptions to disclosure are permissive rather than mandatory and information may be disclosed if appropriate agency regulations so permit.

The *amici* argue that such disclosure should be barred if the information was originally submitted in confidence. While in this status, potential competitive harm resulting from premature disclosure cannot be accurately evaluated. Thus, a dependable right to contest disclosure should be retained in accord with the expressions of congressional intent found in the legislative history of the FOIA. These statements demonstrated an awareness of the distinctive nature of the work product generated by the members of the organizations comprising the *amici curiae* and accorded it appropriate protection within the FOIA's mandate of general openness.

Decisions governing the release of information in the instant matter were made by the personnel of the agency with whom the submitter had filed it. Such persons lack an interest in preserving its confidential nature. Their status, federal employees, exposes them to severe sanctions for failure to make appropriate disclosures to requesters who utilize the Freedom of Information Act. This results in a predisposition to evade confrontations by opting to comply with FOIA requests with expedition which favors the requester rather than the submitter.

Current confusion among the decisions of several courts on this issue makes it difficult for a submitter to determine the most efficient and appropriate action to take for the protection of his interest. Realistically, the sole effective action is to secure immediate injunctive relief and, thereafter, to receive an opportunity to argue substantively before an appropriate forum. Current reality does not meet this expectation as the appropriate forum may be limited to informal discussions with the same

Supreme Court, U.S.
FILED
JUN 8 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-922

CHRYSLER CORPORATION,
Petitioner,

v.

HAROLD BROWN, *et al.*,
Respondents.

BRIEF *AMICUS CURIAE* ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES

ROBERT L. ACKERLY
THOMAS L. PATTEN
KENNETH W. WEINSTEIN

SELLERS, CONNER & CUNEO
1625 K Street, N.W.
Washington, D.C. 20006

Attorneys for the Chamber of Commerce of the United States

Of Counsel:
LAWRENCE B. KRAUS
General Counsel

CHAMBER OF COMMERCE OF THE UNITED STATES
1615 H Street, N.W.
Washington, D.C. 20062

STANLEY T. KALECZYC

NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062

> "[U]ltimate facts as to the probable future adverse consequences can only be determined by putting with those undisputed facts other facts within the experts' knowledge to reach the conclusion as to the consequences."

Although not present in the instant matter, considerable time has been devoted to appellate review which is concluded by remanding the matter for the purpose of establishing an adequate agency record. This could be better devoted to an original, properly conducted trial on predefined, limited issues.

The interest of the *amici* is not to prevent disclosure. It is merely to insure that on the rare occasions when an individual's objections to disclosure are not respected by the federal agency holding his property that he will receive an impartial hearing prior to disclosure.

Persons in the position of the *amici* normally will not be able to incur the economic burden of a *de novo* trial in any but the most potentially damaging situations. However, the availability of this remedy is infinitely preferable to judicial review of agency deliberation under the controlling standard of arbitrary abuse of agency discretion.

In the instant matter, minimal opportunity was afforded to a petitioner which has a legal staff as effective as that of Chrysler Corporation to have a substantial impact in the agency's deliberations. Even Chrysler was not able to present evidence in its own behalf within this limited period. A full ten-day period is rarely afforded by an agency to a submitter. The time must include that needed for notification as well as communication of a decision to all parties on or before the final day. The persons comprising the membership of the *amici* probably cannot. These people do not normally retain house counsel and could do little more then petition the district court to enjoin the proposed disclosure within a period as short as this one. To further

circumscribe their remedies by vesting exclusive jurisdiction in agency personnel whose concern is avoiding legal repercussions from vindictive members of the public compounds this unfairness.

Finally, although this is the era of increasingly greater regulation by government, its concomitant is increased reliance on voluntary submissions of needed information to the regulator. Regulatory agencies depend on this material and will be handicapped in their activities if submitters are determined to disclose only minimal information.

The decision of the Third Circuit in *Chrysler v. Schlesinger* does not encourage confidence in the government's ability to administer internally the Freedom of Information Act. To limit judicial relief to a review of the agency's decision regarded in the light of a legal standard of arbitrary and capricious abuse of discretion permits the controlling decision to be made by the promulgator of the regulations. Joined with the present circumstances in which diverse agencies have promulgated individualized regulations, it would seem that compliance with an internal regulation should not be the pivotal factor controlling disclosure. The alternative is *de novo* judicial proceedings. It is inappropriate for citizens to have exclusive recourse to the same source for both the prevailing law and the controlling decision.

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be reversed and the matter remanded to the court of appeals for entry of judgment denying the petition for review.

Respectfully submitted,

s/ Leonard J. Theberge
Attorney for the Amici Curiae

June 5, 1978

disclosure can be made under the agency's regulations remains. In the instant case, the vagueness of the agency regulation facilitated the administrative determination that disclosure would be in conformity with it. These criteria encourage disinterested, non-technically educated government employees to make expensive, expansive decisions based upon bland readings of legalistic criteria rather than inquiry into the results of this disclosure upon the interests of the submitter, the government and the public. The requester remains anonymous, thus, his interest cannot be considered a specific part of the equation. It is noteworthy that in the *Chrysler* case, the requester never intervened or otherwise participated in the proceedings. 565 F. 2d at 1175 n. 2.

An additional factor commented upon by the Fourth Circuit in *Westinghouse Corp. v. Schlesinger,* 542 F. 2d at 1213, is appropriate for the Court's consideration. The present positive attitude toward open government and general public revulsion against secrecy provide agency personnel with an implicit, predetermined psychological set to release as much information as possible and to avoid being condemmed for failures to disclose. Coupled with the admittedly small agency stake in the results of disclosure, a synergistic effect results in compliance with requests for information as rapidly as possible and the avoidance of legalistic delays.

Finally decisional deadlines as short as ten days discourage attention to traditional protections such as notice and an opportunity to protest being granted to submitters.

Government personnel have to decide under time pressures which make it difficult to regard their final decision as one made with the interests of all parties under active consideration. The interest of agency personnel is to avoid violating either the Freedom of Information Act, resulting in a contempt citation, or 18 U.S.C. §1905, resulting in criminal proceedings. Under the present circumstances, the sanctions accompanying

unauthorized disclosure are more attractive than those of nondisclosure to the deciding employee. Therefore, it is unlikely that the interest of those persons represented by the *amici* will be considered fully when the exemptions from disclosure sections of the FOIA are construed as tightly and narrowly as they have been in recent decisions.

III.

Trial *de novo* is the only effective protection for submitters of confidential information of which disclosure is sought by a Freedom of Information Act request.

If the Freedom of Information Act created a protection, "it carries with it an implied right in a private party to invoke the equity powers of the court to assure him that protection. It matters not that the statute does not in express terms afford him that right." *Westinghouse Electric Co. v. Schlesinger,* 542 F. 2d at 1211 *citing Renegotiation Board v. Bannercraft Co.,* 415 U.S. 1 (1974). Here, the court concluded basic fairness requires a trial *de novo* for submitters as well as requesters of information under the Freedom of Information Act.

The District of Columbia Circuit has been consistent in holding that agency determinations are compelling evidence of whether or not disclosure should have been made, but if appealed, "carry no more weight than those of any other litigant. . . ." *Mead Data Cent., Inc. v. United States Dept. of Air Force,* 556 F.2d 242, 251 (D.C. Cir. 1977).

The necessity for resolving conflicts by testimony and cross examination was acknowledged in *Sears, Roebuck & Co. v. General Services Admin.,* 553 F. 2d 1378, 1382 (D.C. Cir. 1977), *cert. denied,* ____ U.S. ____ (1977).

II.

Agency personnel have no substantial interest in refusing to disclose information requested under the Freedom of Information Act.

It is universally recognized that a federal agency may have little interest in retaining the confidential status of material. However, this exemption was not included within the FOIA for its benefit. *Continental Oil Co. v. Federal Power Com'n.*, 519 F. 2d 31, 35 (5th Cir. 1975). If no independent opportunity is afforded to the submitter of information to protect judicially his interest in continued confidentiality, it is unlikely that the recipient agency will do it for him. *Westinghouse Elec. Corp. v. Schlesinger*, 542 F. 2d 1190, 1213 (4th Cir. 1976), *cert. denied sub. nom. Brown v. Westinghouse Elec. Corp.*, 431 U.S. 924 (1977); *Union Oil Co. of California v. Federal Power Com'n.*, 542 F. 2d 1036, 1045 (9th Cir. 1976); *Instrument Systems Corp. v. United States*, 546 F. 2d 357, 359, 360 (Ct. Cl. 1976).

The *Westinghouse* court found alternative arguments to be "contrary to the whole thrust of the FOIA," holding that the "'caprice of executive officers'" so likely that the court cannot abdicate control over the evidence to such persons. 542 F. 2d at 1215.

Lack of interest by agency personnel has been regarded approvingly as a positive factor to ensure appropriate administration of the Freedom of Information Act. To the contrary, it is the suggestion of the *amici* that this lack of interest coupled with the lack of specialized knowledge needed to understand the potential value of technical information submitted to the government by those represented by the *amici* works to the detriment of that segment of the public whose interest is better served by maintaining the confidentiality of their work product. Counsel for the agency who will ultimately

decide the issue "has little or no incentive to protect the secrets of business community." 30 Bus. Law. at 1134.

Appropriate notification procedures are frequently neither provided nor utilized by agency personnel. "[I]n the majority of situations, notification remains an informal courtesy." 6 Loy. Chi. L.J. at 610. If a submitter is to articulate objections he must be given an opportunity to formalize and present them as affidavits, briefs, or oral argument. If standard procedures respectful of the exemptions embodied in this statute were binding on federal agencies, the number of occasions in which a district court would have to intervene would be insubstantial.

The contents of the regulations controlling the administration of the Freedom of Information Act are drafted by the agency personnel in control of confidential information. Controversies arising under the Freedom of Information Act disclose informal procedures seemingly calculated to disable the submitter from the ability to react appropriately and timely. Conversely, the agency's failures to respect those interests may be counted by the numerous cases reversing and remanding its decisions for additional internal proceedings needed to procure a complete record for judicial use.

When an agency has codified a regulation, worded as that under consideration here, acceding to any request for information can easily be construed as one which "furthers the public interest." [41 C.F.R. §60-40.2(a)]. This does not protect the public nor those persons more intimately involved, the owners of the information.

The *Chrysler* court viewed the Freedom of Information Act as requiring an agency to first ascertain whether or not information submitted to the government should remain confidential by determining if it is protected by a nondisclosure exemption. Even when so protected, an additional and in the view of the *amici* unnecessary inquiry of whether or not

> "When a large investment in research cannot be brought to commercial fruition, because Government has disclosed its once-confidential innovation to competitors, the consumer pays for the loss in higher prices without corresponding benefit — and further research is deterred since the Government may jeopardize its economic returns from a premature economic disclosure." O'Reilly, *Government Disclosure of Private Secrets under the Freedom of Information Act*, 30 Bus. Law. 1125, 1146 (1974-5).

It is essential that a distinction be drawn protecting both the rights of the general public to secure knowledge of the operation of their government, the legitimate objective of the Freedom of Information Act, and those of parties who must furnish knowledge to their government in order to continue their private activities, a goal of equal magnitude within the same statute.

In the latter group are found not only corporations that cannot exist without these submissions but a multitude of private persons, many of whom are represented by the *amici*, who must also reply on various governmental activities which obligate them in turn to furnish information.

The general public has no claim to a business secret. "[P]rivately generated proprietary information [has] value to the supplier . . . based upon secrecy." Note, *Would Macy's Tell Gimbels: Government-Controlled Business Information and the Freedom of Information Act, Forward and Backwards*, 6 Loy. Chi. L.J. 594, 594 (1975).

Compelling reasons exist to afford protection to persons who have voluntarily disclosed such information as part of their responsibility in the dual role of scientist-citizen.

The inclusion of this exemption in the Freedom of Information Act reveals a "Congressional concern that the disclosure of certain information might injure interests in privacy or confidentiality which might be as important as the public's right of general access to agency information." *Chrysler Corporation v. Schlesinger*, 565 F. 2d 1172, 1184 (3rd Cir. 1977). Congressional history suggests that this protection had been granted. If it is to be destroyed, the authority for violating these individual rights should be mandated by Congress rather than the judiciary.

> order to secure the maximum amount of information. . . . *The wisdom of the balance struck by Congress is not open to judicial scrutiny." FAA Administrator v. Robinson,* 422 U.S. 255, 266, 267. (Emphasis added.)

Unfortunately judicial construction has added additional, unlegislated criteria to the definition of confidential information. It must not only be received in anticipation of the maintenance of its confidential nature but its disclosure must also be

> "likely to have either of the following effects:
>
> (1) to impair the Government's ability to obtain necessary information in the future; or
>
> (2) to cause substantial harm to the competitive position of the person from whom the information was obtained "

National Parks and Conservation Ass'n. v. Kleppe, 547 F.2d 673, 687 (D.C. Cir. 1976). See also, *Rural Housing Alliance v. United States Dept. of Agr.,* 498 F.2d 73, 78, 79 (D.C. Cir. 1974).

Although both factors are implicitedly present when disclosure of information which members of the *amici* previously submitted in the belief it would remain exempt from disclosure is threatened, its inchoate nature precludes a realistic appraisal of the potential damage to these interests by premature disclosure. Certainly, the first criterion is fulfilled as:

> "[a] person who knows that business information he provides to the government will be protected from disclosure is more likely to comply more freely and fully with statutory directives, thus easing the task of the government in collecting such information. If information cannot be protected, however, *a person is more likely to resist solicitation efforts by the government and*

> *to supply information reluctantly even when compelled to do so by statute." Developments under the Freedom of Information Act — 1974,* 1975 Duke L.J. 416, 444 (1975). (Emphasis added.)

In order for the most lucrative commercial application to be made of research activities performed by unincorporated individuals, maintenance of its results in secrecy until licensing or patenting is appropriate should be assured. The interests of private parties who may have devoted inordinate amounts of time in the expectation of eventual commercial application and financial remuneration should be protected. When this is not done, substantial competitive harm to the owner of the information, *National Parks* criterion two, has been assured.

In addition to fundamental considerations of morality and confidence in government, the irremediable injury done to the persons represented by the *amici* must be considered. *Westchester Gen. Hosp. Inc. v. Dept. of H.E.W.,* 434 F. Supp. 435 (M.D. Fla. 1977). The monetary value of partially completed research which is not yet focused on commercial use is impossible to appraise accurately. The formulator of technology may have only evolved a relatively small fragment of it. If it becomes public knowledge and is coupled with existent public or private research already performed by interested persons or competitors, the potential commercial injury is magnified. However, an accurate assessment of the financial damages cannot be computed at the time of the disclosure decision or at any specific later date.

The disclosure of privately financed and developed commercial secrets to an unidentified requester harms the general public in a diversity of ways which are equally difficult to evaluate monetarily. Certainly, these costs form a portion of eventual retail value.

persons who determined to disclose the information originally. Under these circumstances, the government cannot expect continued cooperation from citizens who can anticipate suffering adverse effects from unauthorized disclosures. The ability to judicially contest disclosures of a confidential matter in a trial *de novo* prior to its release should be assured submitters of information in confidence.

ARGUMENT

I.

The Freedom of Information Act protects from disclosure unlicensed and unpatented scientific information submitted to the federal government in confidence.

To balance the legitimate needs of government with those of the public in acquiring knowledge of the former's operations was a major objective of Congress in enacting and later amending the Freedom of Information Act. The rights of submitters of information were confined to the exemption from disclosure sections [5 U.S.C. §552(b)]. The interests of persons, including research scientists, desiring to protect their work product from public disclosure were considered by Congress in drafting the trade secret exemption which includes:

> "*scientific or manufacturing processes or developments* . . . . It would include information customarily subject to . . . privileges such as technical or financial data submitted by an applicant to a Government lending or loan guarantee agency. *It would also include information which was given to an agency in confidence, since a citizen must be able to confide in his Government. Moreover, when the Government has obligated itself in good faith not to disclose documents or information which it receives, it should be able to honor such obligations.*" H. Rep. No. 1497, 89th Congress, 2d Sess. 10 (1966). (Emphasis added.) See also, S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965).

The ability to preserve confidential information in this status was reinforced by Attorney-General Ramsey Clark's guide to its administration. Specifically, he found that the final two sentences, quoted herein, "underlie the protection afforded by this exemption to information given to the Government in confidence, whether or not involving commerce or finance." *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act,* 20 Ad. L.R. 263, 302 (1967).

In the same document, the Attorney-General stated that the exemption described in 5 U.S.C. §552(b)(4) unconditionally protected "technical or scientific data submitted or other information submitted in or with an application for research grant or in or with a report while research is in progress." If these guidelines had been consistently reiterated by courts faced with the necessity of defining the scope of the exemption, there would be little need for this *amici* brief. This Court in an opinion by Chief Justice Burger, as recent as 1975, summarized the position of the judiciary when required to construe a Freedom of Information Act exemption:

> "Congress could not reasonably anticipate every situation in which a balance must tip in favor of nondisclosure as a means of ensuring that the *primary, or indeed sole,* source of essential information would continue to volunteer information needed. . . . The public interest is served by assuring a free flow of relevant information to the regulatory authorities. . . . Congress could appropriately conclude the public interest was better served by guaranteeing confidentiality in

TABLE OF CONTENTS

	Page
INTEREST OF THE *AMICUS CURIAE*	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT	4
I. THE COLLECTION AND DISCLOSURE OF BUSINESS SECRETS BY FEDERAL AGENCIES: AN OVERVIEW	4
A. Confidential Business Information Submitted to Federal Agencies	4
B. Use of the FOIA to Discover Competitors' Secrets	7
C. The Business Secrets Exemption	10
1. General Protection of Business Secrets	10
2. Legislative Purpose of Exemption 4	15
D. The Reverse FOIA Problem	18
E. The Reverse FOIA Cases	24
II. THE ISSUE OF WHETHER BUSINESS RECORDS ARE WITHIN EXEMPTION 4 MUST BE DETERMINED BY THE COURT DE NOVO	27
A. De Novo Determination Is an Essential Part of the Congressional Scheme	27
B. The Fallacy of the "Administrative Record"	28
C. De Novo Review Is Required Under the Administrative Procedure Act	32
D. The Congressional Purpose of Exemption 4 Requires a Right to a De Novo Determination	35

		Page
III.	BUSINESS SECRETS ADMITTEDLY WITHIN EXEMPTION 4 SHOULD NOT BE DISCLOSABLE AT THE DISCRETION OF AGENCY OFFICIALS	37
	A. Exemption 4 Forecloses Agency Discretion to Disclose Exempt Business Secrets	37
	B. Agency Officials Should Not Be Permitted to Engage in "Interest Balancing" Where Congress Has Already Performed That Function	40
IV.	BUSINESS SECRETS WITHIN 18 U.S.C. § 1905 MAY NOT BE DISCLOSED UNDER THE FOIA	46
	A. Section 1905 Is a Statute Within Exemption 3 of the FOIA	47
	B. Agency Regulations May Not Authorize Disclosure of Business Secrets Within Section 1905	48
CONCLUSION		51

TABLE OF AUTHORITIES

CASES	Page
American Sumatra Tobacco Corp. v. *SEC*, 93 F.2d 236 (D.C. Cir. 1937)	5
Babcock & Wilcox Co. v. *Rumsfeld*, 70 F.R.D. 595 (N.D. Ohio 1976)	10,32
Bi-Metallic Inv. Co. v. *State Board of Equalization*, 239 U.S. 441 (1915)	33
Burroughs Corp. v. *Schlesinger*, 403 F. Supp. 633 (E.D. Va. 1975)	10
Chandler v. *Roudebush*, 425 U.S. 840 (1976)	35,36
Charles River Park "A", Inc. v. *HUD*, 519 F.2d 935 (D.C. Cir. 1975)	24,25 41,49
Chrysler Corp v. *Schlesinger*, 412 F. Supp. 171 (D. Del. 1976), *vacated*, 565 F.2d 1172 (3rd Cir. 1977)	47
Chrysler Corp. v. *Schlesinger*, 565 F.2d 1172 (3rd Cir. 1977)	*passim*
Citizens to Preserve Overton Park, Inc. v. *Volpe*, 401 U.S. 402 (1971)	32
Continental Oil Co. v. *FPC*, 519 F.2d 31 (5th Cir. 1975), *cert. den.*, 425 U.S. 971 (1976)	25
Dept. of Air Force v. *Rose*, 425 U.S. 352 (1976)	18,27,45
EPA v. *Mink*, 410 U.S. 73 (1973)	18,31,44
FAA v. *Robertson*, 422 U.S. 255 (1975)	41,44,47
FCC v. *Schreiber*, 329 F.2d 517 (9th Cir. 1964), *mod'fd and remanded*, 381 U.S. 279 (1965)	5
Fischer v. *Renegotiation Board*, 355 F. Supp. 1171 (D.D.C. 1973)	13
FTC v. *Texaco, Inc.*, 517 F.2d 137 (D.C. Cir. 1975)	5
General Dynamics Corp v. *Marshall*, No. 77-1192 (8th Cir. Feb. 14, 1978)	25,32,41
Goss v. *Lopez*, 419 U.S. 565 (1975)	33

	Page
Government Sales Consultants v. *GSA*, C.A. No. 77-1294 (D.D.C., filed July 22, 1977)	28
Grumman Aircraft Eng. Corp. v. *Renegotiation Board*, 425 F.2d 578 (D.C. Cir. 1970)	22
Honeywell Information Systems v. *NASA*, C.A. No. 76-353 (D.D.C. July 28, 1976), *appeal dismissed*, No. 76-1977 (D.C. Cir. May 6, 1977)	9,10
Int'l News Service v. *Associated Press*, 248 U.S. 215 (1918)	11,12
Kewanee Oil Co. v. *Bicron Corp.*, 416 U.S. 470 (1974)	10,11,35
Leeds & Northrup Co. v. *ERDA*, C.A. No. 77-1047 (D.D.C., filed June 16, 1977)	10
Londoner v. *Denver*, 210 U.S. 373 (1908)	33
Military Audit Project v. *Kettles*, C.A. No. 75-666 (D.D.C., May 17, 1976)	23
National Parks & Conservation Assn. v. *Kleppe*, 547 F.2d 673 (D.C. Cir. 1976)	29
National Parks & Conservation Assn. v. *Morton*, 498 F.2d 765 (D.C. Cir. 1974)	17,22
Open America v. *Watergate Special Prosecution Force*, 547 F.2d 605 (D.C. Cir. 1976)	21
Pennzoil Co. v. *FPC*, 534 F.2d 627 (5th Cir. 1976)	6,25 32,41
Pharmaceutical Mfrs' Assn. v. *Weinberger*, 411 F. Supp. 576 (D.D.C. 1976)	23
Planning Research Corp. v. *FTC*, 555 F.2d 970 (D.C. Cir. 1977)	24,25
Sears, Roebuck & Co. v. Eckerd, No. 77-1417 (7th Cir. Apr. 25, 1978)	25
Sears, Roebuck & Co. v. GSA, 509 F.2d 527 (D.C. Cir. 1974)	24
Sears, Roebuck & Co. v. GSA, 553 F.2d 1378 (D.C. Cir. 1977), *cert. denied*, 46 U.S.L.W. 3215 (1977)	25,26 29,33

	Page
Telex Corp. v. IBM, 367 F. Supp. 258 (N.D. Okla. (1973), *rev'd in part*, 510 F.2d 894 (10th Cir. 1975)	7,35
Union Oil Co. v. FPC, 542 F.2d 1036 (9th Cir. 1976)	25
USS-OCF-W&M v. Eckerd, C.A. No. 76-1933 (D.D.C. Dec. 9, 1976)	5,10 13,15
Westinghouse Electric Corp. v. Schlesinger, 542 F.2d 1190 (4th Cir. 1976), *cert. denied, sub nom. Brown* v. *Westinghouse Electric Corp.*, 431 U.S. 924 (1977)	*passim*
STATUTES:	
5 U.S.C. § 301	3,47 48,50
5 U.S.C. § 552(a)(1)-(6)	18
5 U.S.C. § 552(a)(4)(B)	27
5 U.S.C. § 552(a)(4)(E)	19,31
5 U.S.C. § 552(a)(4)(F)	19,31
5 U.S.C. § 552(a)(6)(A)(i)	19,29
5 U.S.C. § 552(a)(6)(A)(ii)	19
5 U.S.C. § 552(a)(6)(B)	29
5 U.S.C. § 552(a)(6)(G)	19
5 U.S.C. § 552(b)	38
5 U.S.C. § 552(b)(1)	40
5 U.S.C. § 552(b)(2)	40
5 U.S.C. § 552(b)(3)	40,47,48
5 U.S.C. § 552(b)(4)	40
5 U.S.C. § 552(b)(5)	40
5 U.S.C. § 552(b)(6)	40,45
5 U.S.C. § 552(b)(7)	40
5 U.S.C. § 552(b)(8)	40
5 U.S.C. § 552(b)(9)	40
5 U.S.C. § 706	32,35
7 U.S.C. § 12	14

	Page
7 U.S.C. § 472	14
7 U.S.C. § 507	14
7 U.S.C. § 608d	14
7 U.S.C. § 955	14
7 U.S.C. § 2105(i)	14
13 U.S.C. § 214	14
15 U.S.C. § 45	5
15 U.S.C. § 46	5
15 U.S.C. § 49	5
15 U.S.C. § 176a	14
15 U.S.C. § 2055(a)(2)	14
15 U.S.C. § 2076	6
18 U.S.C. § 1905	*passim*
19 U.S.C. §§ 1330-1341	6
21 U.S.C. § 346a(f)	14
21 U.S.C. § 355(b)(1)-(4)	4
29 U.S.C. § 657(a)	6
42 U.S.C. § 242m(d)	14
42 U.S.C. § 2000e	36
42,U.S.C. § 2000e(8)(e)	14
42 U.S.C. § 2181e	14
Act of July 27, 1789	49
Act of Aug. 7, 1789	49
Act of Sept. 2, 1789	49
Act of Apr. 30, 1798	49
Internal Revenue Code § 6103(a)	14
Internal Revenue Code § 7213(a)(1)-(3)	14

REGULATIONS

Energy Research and Development Procurement Regulation 9-9.202-3, 41 C.F.R. § 9-9.202-3	13
Armed Services Procurement Regulation 3-507.1, 32 C.F.R. § 3-507.1	13

	Page
Armed Services Procurement Regulation 9-203(b), 32 C.F.R. § 9-203(b)	13
Department of Transportation Procurement Regulation 12-9.6302, 41 C.F.R. § 12-9.6302	13
NASA Procurement Regulation 9.203-1, 41 C.F.R. § 18-9.203-1	13
10 C.F.R. §§ 40.62-40.63	6
10 C.F.R. § 50.34	6
10 C.F.R. § 50.70	6
10 C.F.R. § 70.22	6
10 C.F.R. § 70.55	6
10 C.F.R. § 70.57	6
16 C.F.R. § 1115.7	6
32 C.F.R. § 7-602.23	5
32 C.F.R. § 7-103.18	5
32 C.F.R. § 18-704.9	5
32 C.F.R. App. L	30
41 C.F.R. § 60-40	30
41 C.F.R. § 60-40.2(a)	31
Pub. L. No. 92-261, 86 Stat. 103	36
Pub. L. No. 93-502, 88 Stat. 1561	7,19 22,24

LEGISLATIVE MATERIALS:

Hearings on S. 1666 Before the Subcomm. on Administrative Practice and Procedure of the Senate Judiciary Comm., 88th Cong., 1st Sess. (1964)	7,16,50
Hearings on S. 1160 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, 89th Cong., 1st Sess (1965)	17
Hearings Before the Subcomm. on Administrative Practice and Procedure of the Senate Judiciary Comm., 95th Cong., 1st Sess. (1977)	*passim*

	Page
Hearings Before the House Subcomm. of the Comm. on Government Operations, 95th Cong., 1st Sess. (1977)	*passim*
S. Rep. No. 1621, 85th Cong., 2d Sess. (1958)	49
S. Rep. No. 813, 89th Cong., 1st Sess. (1965)	*passim*
S. Rep. No. 93-854, 93d Cong., 2d Sess. (1974)	19
H.R. Rep. No. 1461, 85th Cong., 2d Sess. (1958)	49
H.R. Rep. No. 1497, 89th Cong., 2d Sess. (1966)	16,28,44
H.R. Rep. No. 94-1441, 94th Cong., 2d Sess. (1976)	47
H.R. Rep. No. 92-1419, 92d Cong., 2d Sess. (1972)	19
104 Cong. Rec. 6550 (1958)	49
110 Cong. Rec. 1776 (1964)	17
MISCELLANEOUS:	
Arnold, *Who's Going Fishing in Government Files?*, 6 Juris Doctor 17 (1976)	8
Clement, *The Rights of Submitters to Prevent Agency Disclosure of Confidential Business Information: The Reverse Freedom of Information Act Lawsuit*, 55 Tex. L. Rev. 587 (1977)	29,30
Callman, Law of Unfair Competition, Trademarks and Monopolies (3d Ed. 1968)	11,12,29
Davis, Administrative Law Treatise (1958)	33
O'Reilly, Federal Information Disclosure	4,23
O'Reilly, *Government Disclosure of Private Secrets Under the Freedom of Information Act*, 30 Bus. Law. 1125 (1975)	30,39
Relyea, Library of Congress Congressional Research Service, the Administration of the Freedom of Information Act: A Brief Overview of Executive Branch Annual Reports for 1975, No. 76-166G; for 1976, No. 77-228G	22
Report of the Commission on Government Procurement, Volume 4, Part I (1972)	13

	Page
Scherer, The Economic Effects of Compulsory Patent Licensing (1977)	11
Study to Assess Impact of Releasing Safety and Effectiveness Data on the Pharmaceutical Industry's Incentives to Invest in and Conduct Research and Development Programs, U.S. Dep't of Commerce National Technical Information Service PB-275 856 (prepared by Placon, Inc., Vienna, Va., 1978)	9,15
Note, *Developments Under the Freedom of Information Act—1974*, 1975 Duke L. J. 416	39
Note, *The Effect of the 1976 Amendment to Exemption 3 of the Freedom of Information Act*, 76 Colum. L. Rev. 1029 (1976)	48
Note, *The Freedom of Information Act: A 7 Year Assessment*, 74 Colum. L. Rev. 895 (1974)	28
Note, *Protection From Government Disclosure—the Reverse FOIA Suit*, 1976 Duke L. J. 330	31
Note, *Reverse Freedom of Information Act Suits: Confidential Information In Search of Protection*, 70 Nw. U.L. Rev. 995 (1976)	30
Note, *A Review of the Fourth Exemption of the Freedom of Information Act*, 9 Akron L. Rev. 673 (1976)	39
The Freedom of Information Act—A Tool of Industry?, Sacramento Bee, January 1, 1978, A-3	10,21
Telling Tales—How Law Is Being Used To Pry Business Secrets From Uncle Sam's Files, Wall Street Journal, May 9, 1977	9

INTEREST OF THE AMICUS CURIAE

The Chamber of Commerce of the United States is the largest business federation in the country. With a membership in excess of 69,000 enterprises, including more than 3,700 state and local chambers of commerce and trade associations, the Chamber represents businessmen and women in a broad spectrum of matters of critical importance to the business community.

The instant case is of vital concern to the large number of Chamber members who have submitted—and continue to submit—to federal agencies confidential business information which may be subject to disclosure under the Freedom of Information Act. At stake in this case is the ability of American business to protect trade secrets and business data tendered in confidence to government entities from misuse by foreign and domestic competitors.

The Chamber and its members also are concerned that a judicial determination which impairs the ability of the owners of business secrets to assert affirmatively and vigorously their proprietary interests ultimately will result in a reluctance on the part of business to cooperate voluntarily with government agencies in the collection of data necessary to the performance of their statutory missions.

SUMMARY OF THE ARGUMENT

The Freedom of Information Act* increasingly is being used by competitors to discover the extensive files of business secrets maintained by federal agencies.

FOIA Exemption 4 is an integral part of the vast historical system of federal and state law which protects trade secrets and confidential business information from competitive misuse. The exemption was intended to assure the confidentiality of business secrets which customarily are maintained in confidence by the owner. This protective policy is rooted in the belief that protection of proprietary business secrets fosters invention, industrial efficiency and fair commercial dealing.

The ruling of the Third Circuit in the instant case eviscerates this protection. By limiting a judicial action to prevent disclosure of business secrets to review of the agency record, denying the submitter a de novo determination whether his business records are within Exemption 4, and allowing the agency the discretionary authority to disclose information even though it is found to be within Exemption 4, the Third Circuit's holding makes the exemption meaningless.

A de novo judicial determination as to whether business information is within Exemption 4 is an essential part of the FOIA scheme. Congress provided de novo review of the propriety of agency FOIA decisions to prevent court decisions from becoming "meaningless judicial sanctioning of agency discretion." This rationale is equally applicable to actions to compel disclosure of records as well as actions to enjoin disclosure. Restrictions on the time allowed for action, imposed by the FOIA itself, render the agencies inherently incapable of providing adequate factfinding procedures for deciding whether business secrets should be disclosed. Under these circumstances, where the impairment or destruction of valuable

* 5 U.S.C. § 552 (1976) (hereinafter cited as "FOIA" or the "Act"). Unless otherwise indicated, all U.S. Code citations are to the 1976 edition.

private interests is at stake, the Administrative Procedure Act requires that *de novo* judicial review be provided.

Business secrets which admittedly are within Exemption 4 may not be disclosed at the discretion of agency officials. In enacting Exemption 4, Congress determined as a matter of policy that the need for confidentiality of business information outweighed the general public interest in disclosure. Exemption 4 therefore forecloses agency discretion to disclose exempt business secrets. To grant agency FOIA officials the discretion to release business secrets which admittedly are exempt from disclosure is to nullify this policy and render the exemption nugatory.

Exemption 4 itself embodies a deliberate congressional balancing of the public interests in disclosure and in confidentiality of private business information, and accordingly there is no place for further interest balancing by agency officials once records are found to be exempt. The public policy which protects business secrets would be eroded if interest balancing were permitted on a case-by-case basis. Congress enacted the FOIA precisely to do away with vague phrases such as "the public interest" as a test for confidentiality, and manifestly did not intend to resurrect this unworkable standard as a basis for agencies to circumvent Exemption 4 at their whim.

Agency officials also are prohibited from disclosing business secrets provided to government agencies under the Trade Secrets Act, 18 U.S.C. § 1905. Section 1905 is a statute within Exemption 3 of the FOIA, since it leaves agencies with no discretion to withhold business secrets and establishes particular criteria and types of materials to be withheld. Agency regulations, such as those issued under the housekeeping statute, 5 U.S.C. § 301, may not authorize disclosure of business secrets admittedly within § 1905. The legislative history of the housekeeping statute explicitly declares that it was not intended to affect the confidential status of information protected by 18 U.S.C. § 1905.

ARGUMENT

I.

THE COLLECTION AND DISCLOSURE OF BUSINESS SECRETS BY FEDERAL AGENCIES: AN OVERVIEW

A. Confidential Business Information Submitted to Federal Agencies

Federal agencies collect extensive amounts of private business information in the course of performing an array of statutory functions. Portions of these records describe trade secrets, technical know-how, financial data, and other commercial information of enormous competitive value.[1] Because of its commercial value and the resources invested in its acquisition, this information is customarily maintained in strict confidence by the owner.

The variety of business secrets in the Government's files is impressive. The records may take the form of an application for a license to sell a drug,[2] data submitted in connection with a

[1] It has been estimated that one billion dollars of the United States 1975 balance of payments reflected licensing of trade secrets and know-how. *See* J. O'Reilly, Federal Information Disclosure, ch. 14, p. 14-20 n.42 (1977), *citing* R. Milgrim, address to Illinois Institute of Continuing Legal Education, Oct. 29, 1976.

[2] To obtain approval of an application for a new drug, for example, the Food and Drug Administration requires the submission of extensive information describing testing techniques, safety and effectiveness test results, as well as the drug's composition and method of manufacture. *See* 21 U.S.C. § 355 (b)(1)-(4) (1970). An application may consume several volumes of data. *See Business Record Exemption of the Freedom of Information Act: Hearings Before the House Subcomm. of the Comm. on Government Operations,* 95th Cong., 1st Sess. 88 (1977) (statement of FDA Commissioner Kennedy) (hereinafter cited as *"1977 House FOIA Hearings"*).

registration statement,[3] financial report,[4] government contract proposal,[5] data concerning telecommunication production,[6] report concerning manufacture of chemical substances,[7] test

[3] Information submitted to the Securities and Exchange Commission in connection with the registration of securities may contain sensitive commercial and financial information including sales figures, "mark-up," cost of goods sold, product inventories and profit margins. *See* American Sumatra Tobacco Corp. v. SEC, 93 F.2d 236 (D.C. Cir. 1937); 15 U.S.C. §§ 78l, 78m, 78x; 17 C.F.R. § 200.80(b)(4) (1977).

[4] Line-of-business reports submitted to the Federal Trade Commission may refer to such diverse matters as sales and profit figures, market share data, advertising plans and geophysical data. *See* 15 U.S.C. §§ 45, 46 and 49; FTC v. Texaco, Inc., 517 F.2d 137, 150-151 (D.C. Cir. 1975).

[5] Federal agencies receive an extensive array of technical, financial and other commercial information in the course of their procurement activities. Detailed technical and financial disclosures are contained in contract proposals. *See, e.g.,* Armed Services Procurement Regulation (ASPR) 3-507.1, 32 C.F.R. § 3-507.1 (1976). *See also* USS-OCF-W&M v. Eckerd, C.A. No. 76-1933 (D.D.C. Dec. 9, 1976) (slip op.). Additional technical and financial data are submitted during contract performance in engineering changes, test reports, audit reports, equal employment opportunity reports, payroll records and a host of other submissions. *See, e.g.,* 32 C.F.R. § 7-602.23 (payroll records), 7-103.18 (EEOC reports), 7-103.29 (environmental data), 7-104.15 (Government may inspect all books), 18-704.9 (Government right to investigate labor disputes) (1976).

[6] The Federal Communications Commission, in connection with its responsibility for licensing and programming, obtains data from radio and television networks regarding acquisition, ownership, production, distribution, sale and licensing of programs. *See* FCC v. Schreiber, 329 F.2d 517 (9th Cir. 1964), *mod'fd and remanded,* 381 U.S. 279 (1965).

[7] The Environmental Protection Agency receives information concerning inventories, product formulas, testing techniques and results and manufacturing processes for chemical substances and pesticides. *See* 42 Fed. Reg. 64,572-96 (Dec. 23, 1977) (toxic substances inventory reporting requirements); 15 U.S.C. § 2605, 2608; 7 U.S.C. § 136a (c)(2) and 40 C.F.R. § 162.1 (1977) (pesticide registration data requirements).

report on nuclear equipment,[8] investigatory report,[9] inspection report,[10,11] and a study of oil or gas reserves,[12] among many others.

Testifying in support of an exemption for private business information during the congressional hearings on the FOIA bill, a Justice Department representative stated:

> Much of this information is volunteered by employers, merchants, manufacturers, carriers, exporters, and other businessmen and professional people for purposes of market news services, labor and wage statistics, commercial reports, and other Government services which are considered useful to the cooperating reporters, the public and the agencies. Perhaps the greater part of such information is exacted, by statute, in the course of necessary regulatory or other governmental functions. [13]

[8] The Nuclear Regulatory Commission obtains proprietary information pertaining to the design, development and testing of equipment for nuclear power production. *See, e.g.,* 10 C.F.R. §§ 40.62-40.63, 50.34, 50.70, 70.22, 70.55-70.57 (1977).

[9] For example, the Tariff Commission, pursuant to its powers to investigate unfair competitive practices in the import trade, and to provide guidance for establishment of tariffs, obtains extensive data pertaining to the costs of production of domestic and foreign products. *See* 19 U.S.C. §§ 1330-1341 (1970 & Supp. V 1975).

[10] The Consumer Product Safety Commission requires the submission of inspection reports which may disclose sales volume as well as formulas, processes and designs employed for the manufacture of products. *See* 15 U.S.C. § 2076, 16 C.F.R. § 1115.7 (1977).

[11] The Occupational Safety and Health Administration maintains inspection case files which may contain employee identification data, as well as blueprints, drawings, designs, chemical formulas, specifications, and manufacturing processes. *See* 29 U.S.C. § 657(a) (1970), 29 C.F.R. § 1903 (1977).

[12] The Federal Power Commission obtains statistics regarding natural gas and oil well reserves. *See* Pennzoil Co. v. FPC, 534 F.2d 627 (5th Cir. 1976).

The concern over governmental disclosure of these extensive files of private business records has prompted considerable comment and investigation.[14]

B. Use of the FOIA to Discover Competitors' Secrets

The wealth of valuable business secrets in the files of government agencies and the greatly liberalized disclosure policies brought about by the 1974 Amendment of the FOIA[15] have facilitated the increasingly widespread and disturbing use of the FOIA as a vehicle for industrial espionage.[16] This problem was discussed in detail in recent FOIA oversight hearings.[17]

[13] *Freedom of Information: Hearings on S. 1666 and S. 1663 Before the Subcomm. on Administrative Practice and Procedure of the Senate Judiciary Comm.*, 88th Cong., 1st Sess. 199 (1964) (hereinafter cited as "*1964 Senate FOIA Hearings*").

[14] *See* Brief *Amicus Curiae* of the Chamber of Commerce in Support of Petition for a Writ of Certiorari at 5, n.7; *FOIA Hearings, infra* note 17, *supra* note 3.

[15] Act of November 21, 1974, Pub. L. No. 93-502, 88 Stat. 1561. *See* discussion at pp. 19-24 *infra.*

[16] Because of their great commercial value, trade secrets and confidential commercial information historically have been the subject of misappropriation by competitors. *See, e.g.,* Telex Corp. v. IBM, 367 F. Supp. 258 (N.D Okla. 1973), *rev'd, in part,* 510 F.2d 894 (10th Cir. 1975). There, the dispute over the theft of proprietary information such as marketing analyses, financial forecasts, product costs, plans for new products, and technical details for certain computer equipment, led to the entry of judgments totaling $18.5 million. 510 F.2d at 933. *See generally* R. Milgrim, Trade Secrets (1977).

[17] *See 1977 House FOIA Hearings* at 14, 69-71, 77, 104-05, 116; *Freedom of Information Act: Hearings Before the Subcommittee on Administrative Practice and Procedure of the Senate Judiciary Committee,* 95th Cong., 1st Sess. 4, 425-27 (hereinafter "*1977 Senate FOIA Hearings*").

The Commissioner of the Food and Drug Administration described the problem at his agency:

> The records we maintain are often laden with trade secrets or confidential commercial information and, as the recipient of enormous numbers of FOIA requests — we expect some 25,000 this year — we are called upon daily to make disclosure decisions that involve potentially valuable business information. [18]

Approximately 86 percent of the FOIA requests received by the FDA come from industry and private attorneys. The agency suggested that the large bulk of these requests were associated with "industrial espionage in which many commercial firms engage."[19]

> Indeed, it is difficult to avoid the conclusion that FOI is substantially being used as a means of corporate intelligence gathering. This certainly is not what the FOI Act was designed to achieve.[20]

A recent FDA sponsored study concluded that disclosure to competitors of registration data submitted by firms to obtain

---

[18] *1977 House FOIA Hearings* at 68.

[19] *See* 42 Fed. Reg. 3094 (1977). The FDA experience prompted one commentator's observation that "freedom of information may be less a vehicle for informing the public than a vast fishing expedition for private industry." Arnold, *Who's Going Fishing in Government Files?*, 6 Juris Doctor 17, 22 (April 1976).

About 40 percent of the FOIA requests to the FDA come from "FOI service companies" which place and monitor FOIA requests on behalf of corporate clients. The Director of the FDA's public records and documentation center stated that "we get a lot of requests from companies who are trying to get valuable commercial information about their competition. . . ." *Id.*

[20] *1977 Senate FOIA Hearings, supra* note 17, at 4 (statement of Sherwin Gardner).

approval of new drug applications would deter innovation and investment in research and development.[21]

Use of the FOIA to obtain a competitor's proprietary manufacturing processes,[22] product designs,[23] and technical and financial data submitted in successful government contract proposals [24] has been reported, and numerous other incidents

---

[21] *Study to Assess Impact of Releasing Safety and Effectiveness Data on the Pharmaceutical Industry's Incentives to Invest in and Conduct Research and Development Programs,* U.S. Dep't of Commerce National Technical Information Service PB-275 856 at vi, 86-88 (prepared by Placon, Inc., Vienna, Va. 1978).

[22] Dow Chemical Company complained of an incident which occurred during negotiations with a foreign firm for sale of Dow technology regarding a proprietary process for producing a commercial product. While the negotiations were in progress, Dow was required to submit information about the process to a federal agency. Unknown to Dow, the foreign firm obtained copies of the information submitted to the agency by Dow and other U.S. producers under the FOIA. The foreign firm subsequently renounced interest in the purchase of Dow's technology. *See 1977 House FOIA Hearings, supra* note 3, at 283.

[23] The Air Cruisers Company received approval of a new and commercially valuable large life raft design based on data submitted to the FAA. Air Cruisers' competitor obtained the life raft design from the FAA through a Freedom of Information Act request. The information enabled the competitor to design its own large life raft and win an important European contract that it was competing for against Air Cruisers. *See Telling Tales - How Law Is Being Used To Pry Business Secrets From Uncle Sam's Files,* Wall Street Journal, May 9, 1977, *reprinted in 1977 Senate FOIA Hearings, supra* note 17, at 425-27.

[24] In Honeywell Information Systems v. NASA, C.A. No. 76-353 (D.D.C. July 28, 1976), *appeal dismissed,* No. 76-1977 (D.C. Cir. May 6, 1977), Honeywell's competitors in the computer industry, Burroughs Corporation, Univac Corporation and Control Data Corporation, sought information from Honeywell's successful government contract proposal for computer services and equipment which disclosed its pricing and discount policies, cost and profit margin, and innovative technical methodologies for computer software. Slip op. at 3.

(Footnote continued)

involving use of the FOIA to discover competitors' business secrets also have been noted.[25] As one court observed, "the problems posed by companies using the Freedom of Information Act to conduct 'industrial espionage' remain troublesome."[26]

C. The Business Secrets Exemption

1. *General Protection of Business Secrets*

Trade secrets and confidential business information traditionally have been protected against competitive misuse under both federal and state law. This protective policy stems from the belief that in a free enterprise economic system protection of proprietary business secrets promotes innovation, invention and industrial efficiency, as well as honest dealing and fair commercial practices.[27] Exemption 4 of the FOIA is an

---

(Footnote continued)

Competitors' use of the FOIA to obtain similar computer system technical and financial data from contract proposals was at issue in Burroughs Corp. v. Schlesinger, 403 F. Supp. 633 (E.D. Va. 1975) (attempt by Sperry Rand-Univac to obtain Burrough's data); Leeds & Northrup Co. v. ERDA, CA. No. 77-1047 (D.D.C., filed June 16, 1977) (attempt by Honeywell to obtain Leeds & Northrup's data) (dismissed upon stipulation not to disclose disputed records, July 11, 1977).

See also USS-OCF-W&M v. Eckerd, C.A. No. 76-1933 (D.D.C. Dec. 9, 1976) (preliminary injunction) (attempt by competitor to obtain contract proposal disclosing innovative design data); Babcock & Wilcox Co. v. Rumsfeld, 70 F.R.D. 595 (N.D. Ohio 1976) (request for data from plaintiff's purchase orders disclosing pricing and negotiation policies for nuclear power propulsion systems).

[25] *See 1977 House FOIA Hearings, supra* note 3, at 14, 69-71, 77, 104-05, 116. *See generally* Brief *Amicus Curiae* of the Chamber of Commerce, *supra* note 14, at 5, n.7.

[26] Honeywell Information Systems, Inc. v. NASA, *supra* note 24, slip op. at 8, n.8. *See also The Freedom of Information Act—A Tool of Industry?,* Sacramento Bee, January 1, 1978, A-3.

[27] *See generally* Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470 (1974), discussed *infra.*

integral aspect of the overall state-federal policy of protection for business secrets which has been woven into our legal system.

Confidential business information historically has received protection under the law of trade secrets (discussed at length by this Court in *Kewanee Oil Company v. Bicron Corp.*)[28] and the law of unfair competition.[29] In holding that the trade secret laws complement rather than conflict with the federal patent system, the Court observed that the purpose of the legal protections for trade secrets, as well as patents, is to encourage invention, promote the subsidization of research and development, and increase economic efficiency:[30]

> [K]eeping [customer lists or advertising campaigns] secret encourages businesses to initiate new and individualized plans of operation, and constructive competition results. This in turn leads to a greater variety of business methods than would otherwise be the case if privately developed marketing and other data were passed illicitly among firms involved in the same enterprise.[31]

Trade secret protection was found to have a "decidedly beneficial effect on society:"

> Trade secret law will encourage invention in areas where patent law does not reach, and will prompt the independent innovator to proceed with the discovery and exploitation of his invention. Competition is fostered . . .

and the public obtains the benefits of the invention.[32] Without this protection "organized scientific and technological research

---

[28] 416 U.S. 470 (1974).

[29] *See generally* Int'l News Service v. Associated Press, 248 U.S. 215 (1918); R. Callman, Law of Unfair Competition, Trademarks and Monopolies, ch. 14, 15 (3d Ed. 1968).

[30] 416 U.S. at 482-84.

[31] *Id.* at 483.

[32] *Id.* at 485. *See also* F.M. Scherer, The Economic Effects of Compulsory Patent Licensing 14 (1977).

could become fragmented, and society, as a whole, would suffer."[33]

Trade secret laws not only promote research and innovation, but also prevent the corruption of honest business methods and fair competitive dealing, and "the inevitable cost to the basic decency of society when one firm steals from another."[34] To condone industrial espionage threatens "a most fundamental human right, that of privacy. . . ." [35]

The law of unfair competition similarly forbids the unlawful exploitation of a competitor's efforts, investment and skills. In *Int'l News Service v. Associated Press,* the Court disapproved a competitor's attempt to take information "that has been acquired by complainant as the result of organization and the expenditure of labor, skill, and money, and which is salable by complainant for money," and appropriate and sell it as its own, endeavoring "to reap where it has not sown."[36]

Federal laws and regulations also are replete with protections for business secrets. In government contracting, extensive business data are submitted to federal agencies. The contractor's interest in protecting its technical data has been set forth by the Commission on Government Procurement:

> Commercial organizations have an economic interest in technical data (particularly data disclosing details of design or manufacture) which they have developed at their own expense. Such data is closely guarded because its disclosure to competitors could jeopardize the competitive advantage gained through developing the data. As long as the data is not availble to others, an originating contractor may be the sole source or, at least, competitively advantaged, in providing the product or service to which the data is related.

[33] 416 U.S. at 486.
[34] *Id.* at 487.
[35] *Id.*
[36] 248 U.S. 215, 239 (1918). *See also* Callman, *supra* note 29.

> The willingness of many prospective contractors and suppliers to accept Government contracts is dependent on the willingness of the Government to protect information resulting from private development. [37]

To protect such data, procurement agencies have adopted regulations respecting the contractors' rights in data.[38] Without protection for contractors' business secrets, the public contracting system, dependent upon full competition to secure for the public the best goods at the lowest prices, could suffer a serious loss of interested competitors.[39]

Numerous federal statutes provide for the confidentiality of specific types of business secrets. The Food, Drug and Cosmetic Act prohibits FDA disclosure of "any information acquired under [the agency's] authority concerning any method or process which as a trade secret is entitled to protection." 21 U.S.C. § 331(j) (1970). The EPA is prohibited from disclosing trade secrets and confidential business information under § 307(a) of the Clean Air Act of 1971, 42 U.S.C. § 1857h-5(a)(1) (Supp. V 1975), § 14 of the Toxic Substances Control Act, 15 U.S.C. § 2613, § 10 of the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136h. The FTC has the authority "to make public from time to time such portions of the information obtained by it hereunder, except trade secrets and names of customers," § 6(f) of the Federal

[37] Report of the Commission on Government Procurement, Volume 4, Part I—Patents, Technical Data, and Copyrights, 127 (1972).
[38] *See e.g.,* NASA Procurement Regulation 9.203-1, 41 C.F.R. § 18-9.203-1 (1977); Armed Services Procurement Regulation 9-203(b), 32 C.F.R. § 9-203(b) (1976); Energy Research and Development Administration Procurement Regulation 9-9.202-3, 41 C.F.R. § 9-9.202-3 (1977); Department of Transportation Procurement Regulation 12-9.6302, 41 C.F.R. §12-9.6302 (1977).
[39] *See* Fisher v. Renegotiation Board, 355 F. Supp. 1171, 1175 (D.D.C. 1973); USS-OCF-W&M v. Eckerd, *supra* note 24, slip op. at 5.

Trade Commission Act, 15 U.S.C. § 46(f). The Patent Office is required to maintain applications for patents in confidence, 35 U.S.C. § 122, (1970). Many other examples may be cited [40] including the Trade Secrets Act, 18 U.S.C. § 1905, discussed *infra,* which makes unlawful the disclosure of certain business information by agency officials.[41]

Failure to maintain strong protections for business secrets submitted to the government in the face of the FOIA will result in reluctance by industry to continue voluntarily to submit information to government agencies, and to commit resources to certain areas of research and development. Reluctance to cooperate with agencies already has been reported,[42] and government officials predict that inadequate protection under FOIA Exemption 4 will further restrict the flow of information to the government.[43] Industry's unwillingness to invest in

[40] *See e.g.,* 7 U.S.C. §§ 12, 472, 507, 608d, 955, 2105(i); 13 U.S.C. § 214; 15 U.S.C. §§ 176a, 2055(a)(2); 21 U.S.C. § 346a(f) (1970); 29 U.S.C. § 664 (1970); 42 U.S.C. §§ 2000e(8)(e), 2181e (1970); 42 U.S.C. § 242m(d) (Supp. V 1975); Internal Revenue Code § 6103(a), and § 7213(a)(1)-(3).

[41] *See* pp. 46-50 *infra.*

[42] Former SEC Commissioner Manuel Cohen stated, "Companies are becoming increasingly shy about sharing information with government because they fear it will no longer be protected." Arnold, *supra* note 19, at 18. *See also 1977 Senate FOIA Hearings, supra* note 17, at 44, 314.

[43] The Justice Department has stated that the failure to provide adequate and certain protection for business information probably would have a "definite restraining effect" on the flow of information, and that "substantial detriment to the effective performance of some governmental functions can be anticipated." *1977 House FOIA Hearings, supra* note 3, at 231-32.

The Deputy General Counsel of the Federal Trade Commission commented:

> One consequence of making information public is that it is harder to get it. That is another factor we have to take into account. We have a much bigger backlog of litigation and resistance to our inquiries now than used to be the

(Footnote continued)

innovative research and development, whose results may be disclosed to competitors under the FOIA, has been documented in a recent agency report.[44]

To conclude, "A national policy exists which protects confidential business information."[45] This policy, deeply rooted in the federal and state legal systems, forms the backdrop for the interpretation and understanding of FOIA Exemption 4.

2. *Legislative Purpose of Exemption 4*

Exemption 4 was created to "assure the confidentiality" of business information which "would not customarily be made public by the person from whom it was obtained by the government."[46] The Senate Judiciary Committee explained:

> This exception is necessary to protect the confidentiality of information which is obtained by the Government through questionnaires or other inquiries, but which would customarily not be released to the public by the person from whom it was obtained.[47]

(Footnote continued)

> case. It is precisely because of the possibility that the Commission will make the information public.
>
> There is a case in point. In 1950, we did a survey of the thousand largest companies just to get information about their sales broken down by census product categories. Everyone complied; there wasn't any fuss or any litigation. The individual company data was not made public until 1972.

We are currently conducting a successor survey. It is being fought tooth and nail by a significant number of the companies including the biggest company in the country.

1977 Senate FOIA Hearings at 24 (statement of Gerald P. Norton); *see also* pp. 8, 13.

[44] *See* FDA report, *supra* note 21.

[45] USS-OCF-W&M v. Eckerd, *supra* note 24, slip op. at 5.

[46] H. R. Rep. No. 1467, 89th Cong., 2d Sess. 10 (1966), 1966 U.S. Code Cong. & Ad. News 2418, 2427.

[47] S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965).

Examples of information within the exemption include business sales statistics, inventories, customer lists, and manufacturing processes.[48]

The case for a business secrets exemption was advocated by numerous agencies.[49] The principal concern was for an assurance that business secrets which traditionally had been sheltered against release to competitors would continue to receive confidential treatment under the new freedom of information law.[50] For example, a Treasury Department official stated:

> We can see no reason for changing the ground rules of American business so that any person can force the Government to reveal information which relates to the business activities of his competitor.[51]

A Justice Department official echoed the view that protection of business secrets was necessary in order to preserve the Nation's commercial and economic system:

> A second problem area lies in the large body of the Government's information involving private business data and trade secrets, the disclosure of which could severely damage individual enterprise and cause widespread disruption of the channels of commerce. . . . [T]he greater part of such information is exacted, by statute, in the course of necessary regulatory or other governmental functions.
>
> Again, not only as a matter of fairness, but as a matter of right, and as a matter basic to our free enterprise system, private business information

[48] H.R. Rep. No. 1497, *supra* note 46.

[49] *See 1964 Senate FOIA Hearings, supra* note 13, at 244-45 (AEC comments), 250-51 (USDA comments); 254, 257-58 (Commerce Dept. comments); 268-71 (Treasury Dept. comments).

[50] *Id.* at 244-45, 250-51, 254, 257-58, 268-71.

[51] *Id.* at 174.

> should be afforded appropriate protection, at least from competitors.[52]

The exemption was supported by representatives of industry[53] and members of Congress, because of the potential for competitive misuse of business secrets[54] and because disclosure could "seriously jeopardize" sources of information relied on by federal agencies.[55] When, during hearings on an FOIA bill, the question was raised whether detailed "financial, economic and technical" information required by an agency under a loan program could be disclosed to the borrower's competitors, a member of the Subcommittee stated:

> There is a specific exemption in here to cover that point, and I do not think anybody has any intention that this material be made public. [56]

The legislative history of Exemption 4 demonstrates a strong congressional desire to "avert the danger that valuable business information would be made public by agencies which had obtained it pursuant to statute or regulation."[57] Although

[52] *Id.* at 199.

[53] *See, e.g., id.* at 89-90 (testimony of National Association of Broadcasters on consequences of disclosure of business information filed with the Federal Communications Commission).

[54] *Id.* at 102 (information filed in Small Business Administration loan application would reveal financial condition to competitors). *See* National Parks and Conservation Ass'n. v. Morton, 498 F.2d 765, 768 (D.C. Cir. 1974).

[55] 110 Cong Rec. 1776 (1964) (sources of information relied upon by the Bureau of Labor Statistics would be "seriously jeopardized" unless the information collected by the Bureau was exempt from disclosure). *See* National Parks, *supra* note 54, at 767 ("Unless persons having necessary information can be assured that it will remain confidential, they may decline to cooperate with officials and the ability of the Government to make intelligent, well informed decisions will be impaired.").

[56] *Hearings on S. 1160 before the Subcom. on Administrative Practice and Procedure of the Sen. Comm. on the Judiciary,* 89th Cong., 1st Sess. 342 (1965).

[57] National Parks, *supra* note 54, at 768.

the FOIA primarily was intended to provide a right to disclosure of government records, Congress intended Exemption 4 to protect an *equally important* right to privacy. The Senate Judiciary Committee declared:

> At the same time that a broad philosophy of 'freedom of information' is enacted into law, it is necessary to protect certain equally important rights of privacy with respect to information in government files. . . .[58]

Exemption 4 must be viewed as an integral part of the comprehensive legal environment which protects business secrets against misappropriation by competitors. Perceived in this light, it seems clear that the purpose of this exemption was to ensure the continuation of the traditional precepts of protection for business secrets which existed at the time the FOIA was enacted. Exemption 4 was to maintain the status quo: Business information which industry had customarily held in confidence would continue to be protected from disclosure by Exemption 4.

D. The Reverse FOIA Problem

The FOIA is a disclosure statute.[59] The problem which Congress remedied by enactment of the FOIA was the improper withholding of information by agencies,[60] and accordingly the Act provides explicit mechanisms for a private person to obtain documents held by an agency.[61]

The legislative history of the FOIA is virtually devoid of any reference to disputed incidents of agency disclosure of private business information arising prior to the law's enactment. Since withholding, rather than disclosure, was seen to be the problem in 1966, the statute is consumed, from a *procedural*

[58] S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965).

[59] *See generally* EPA v. Mink, 410 U.S. 73, 79 (1973); Dept. of Air Force v. Rose, 425 U.S. 352, 360-361 (1976).

[60] *Id.*

[61] *See* 5 U.S.C. § 552(a)(1)-(6).

vantage, with devices to ensure access to records. While the Act and its history demonstrate obvious strong concern for protecting certain substantive privacy rights,[62] no actual problems in this regard had previously arisen and consequently no express procedural rights for submitters of information were included in the Act. And indeed, for several years following the enactment of the FOIA, no cases challenging agency disclosure of private business records are reported. This changed drastically with the enactment of the FOIA amendments in 1974.[63]

In response to "years of foot-dragging by the federal bureaucracy"[64] and the widespread reluctance of agencies to "honor the public's right to know,"[65] Congress amended the FOIA in 1974 to facilitate "freer and more expeditious public access to government information."[66] The amendments promoted agency disclosure in several respects. Principally, they required that agency determinations whether to disclose requested records be made within ten days after receipt of the request;[67] they provided sanctions against agency employees for arbitrary withholding of records;[68] they allowed assessment of attorney's fees and litigation costs against the United States if the complainant substantially prevailed;[69] and they provided that noncompliance with a court order by agency employees may be punished with a contempt citation.[70]

[62] *See* Part I(C) *supra.*

[63] Act of November 21, 1974, Pub. L. No. 93-502, 88 Stat. 1561.

[64] Administration of the Freedom of Information Act, 21st Report by the Committee on Government Operations, H.R. Rep. No. 92-1419, 92nd Cong., 2nd Sess. 8 (1972).

[65] *Id.*

[66] S. Rep. No. 93-854, 93rd Cong., 2nd Sess. 1 (1974).

[67] *See* 5 U.S.C. § 552(a)(6)(A)(i). Appeals from adverse determinations are required to be determined by the agency within twenty days. 5 U.S.C. § 552(a)(6)(A)(ii).

[68] 5 U.S.C. § 552(a)(4)(F).

[69] 5 U.S.C. §552(a)(4)(E).

[70] 5 U.S.C. § 552(a)(4)(G).

Although the 1974 amendments achieved the intended goal of facilitating public access to agency files, they also had the unfortunate and unintended effect of promoting the flow of business secrets from these files into the hands of competitors. There are several reasons why this occurred.

First, the amendments finally reversed the bureaucratic impulse to shield, rather than reveal, information. Before the amendments, an agency typically might withhold 90 percent of its files and disclose 10 percent. After the amendments, these figures were reversed.[71] Many of these files include private business records.

Second, the amendments made it much more difficult for agencies to cull out information of commercial importance to the submitter. By limiting the agencies to ten working days within which to find, review and determine the exempt status of records, the amendments precluded careful analysis of the competitive consequences of disclosure of business information. The SEC, for example, announced that even though there may be a valid basis for objection to disclosure on the grounds of business secrecy, the stringent time limitations of the Act prevent the Commission from refusing to disclose records on this basis.[72] The agencies themselves do not possess enough

[71] *See e.g.*, testimony of Stuart Pape, Office of General Counsel, FDA, *1977 House Foia Hearings* at 74; *See also id.* at 9, 12, 32, 84, 98.

[72] SEC Release No. 33-5571, 40 Fed. Reg. 8797, 8799 (March 3, 1975):

> The Commission regrets that in many cases the Commission will disclose records although persons who cooperated in its investigation would have reasonable grounds to object, either because of personal privacy or business secrecy considerations. But the stringent time requirements under the Freedom of Information Act, as amended, as well as the heavy financial and manpower burden that the Commission would be obliged to sustain if it were to attempt to examine each individual record for these purposes, would generally prevent the Commission from refusing to make disclosure on these bases.

information and expertise to appreciate the competitive value of certain business records, and the Act does not afford them the time to obtain such information from the submitter.[73] Given their shortage of time and lack of knowledge, and the ever-present threat of employee sanctions and assessment of attorney's fees for improper withholding, it is not difficult to perceive why disclosure of business records has been the path of least resistance from the agencies' point of view.[74]

Third, the sheer numbers of FOIA requests increased markedly as a result of the enactment of the 1974 amendments.[75] Most of the present use of the FOIA is by corporations,

[73] On the issue of whether the disclosure of business records would cause competitive harm to the submitter, the EPA, for example, has stated that "the Agency seldom has much information with which to make this judgment." *1977 House FOIA Hearings, supra* note 3, at 5. The EPA has recognized, however, that where it does not have enough information on the issue of business secrecy, and cannot obtain the information and evaluate the issues within ten days, it must, when a reasonable claim of confidentiality is made by the submitter, deny the request and attempt to obtain the information it needs for its determination. *Id.* at 4-5. Even when it does obtain information from a submitter asserting reasons for confidentiality, the EPA admits that "without specialized knowledge of the business or the particular industry" the Agency finds it difficult to evaluate whether disclosure would result in competitive harm to the submitter. *Id.*

[74] This subject is discussed in more detail in Part II(B) *infra.*

[75] Several agencies reported greatly increased numbers of requests after the enactment of the amendments. For example, the FBI received 447 FOIA requests in 1974; the number increased to 13,875 in 1975 and approximately 17,000 in 1977. During the same period of FBI's cost of implementing the statute rose from $160,000 to $9.1 million. The Department of Justice handled 100 FOIA appeals the year preceding the 1974 amendments, and 1,276 the following year. *See* Open America v. Watergate Special Prosecution Force, 547 F.2d 605, 612, 617 (D.C. Cir. 1976); *The Freedom of Information Act— A Tool of Industry?*, Sacramento Bee, Jan. 1, 1978, at A-3. The EPA reported receiving only one FOIA request in the first six months of its existence (to July 1971), Joint Committee Print, House Com-

(Footnote continued)

private attorneys, and FOIA service firms, and a substantial portion of these requests are directed at private business records.[76]

Fourth, shortly before the enactment of the amendments the D.C. Circuit issued an extensive analysis of the scope of Exemption 4 in *National Parks and Conservation Assn. v. Morton,* 498 F.2d 765 (D.C. Cir. 1974). Prior to this case, decisions involving Exemption 4 generally had been guided by the relevant language in the Senate and House Reports, providing that information should be considered exempt if it is the type which would customarily not be released to the public by the person from whom it was obtained. *See, e.g., Grumman Aircraft Eng. Corp. v. Renegotiation Board,* 425 F.2d 578 (D.C. Cir. 1970). In *National Parks,* however, the court adopted a new test for the exemption, which required the proponent of the exemption to show that disclosure of the disputed records would be likely to cause substantial harm to the competitive position of the submitter. 498 F.2d at 770. The difficulty presented by this test, requiring a finding that release of records would in fact be "likely" to actually cause the submitter "substantial" competitive harm, had the effect of severely narrowing the protection afforded by the exemption and con-

(Footnote continued)
mittee on Government Operations and Senate Judiciary Committee: Freedom of Information Act and Amendments of 1974 (P.L. 93-502), 94th Cong., 1st Sess. 105 (1975). In calendar year 1976, the EPA received 4,113 FOIA requests, of which 96 percent were granted, *1977 House FOIA Hearings, supra* note 3, at 9.

For further examples from other agencies, *see generally* and *compare* H. Relyea, Library of Congress Congressional Research Service, the Administration of the Freedom of Information Act: A Brief Overview of Executive Branch Annual Reports for 1975 No. 76-166G (1976), with the same report for the year 1976: No. 77-228G (1977).

[76] *See 1977 House FOIA Hearings, supra* note 3, at 69; *see also id.* at 8, 23, 77. *See generally* note 17, *supra* and accompanying text.

sequently enlarged the flow of business records from agency files.[77]

As a result of these factors, agency disclosure of private business records has become a frequent occurrence. Companies who had previously submitted such information have learned that the FOIA does not require that notice be provided prior to disclosure of their records, and in many instances, the agencies have not provided prior notice.[78] Even where notice has been

[77] The inability of the Government to adequately protect confidential business information under the National Parks test, *even when the Government agrees the data should not be disclosed,* is illustrated by Military Audit Project v. Kettles, C.A. No. 75-666 (D.D.C., May 17, 1976) (granting summary judgment in favor of FOIA requester). The court reluctantly found the Government had not met its burden of proof that disclosure of a government contractor's profits, labor costs and production cost trends would be "likely" to cause the contractor "substantial" competitive harm, slip op. at 7-10, but noted:

> The government's failure of proof has caused this Court some consternation. Common sense leads this Court to hesitate in ordering disclosure since the very nature of the data contained in the documents raises the possibility of harm to Lockheed's competitive position.

Id. at 10. *See also 1977 House FOIA Hearings, supra* note 3, at 5 (describing the EPA's difficulty in applying the "substantial competitive harm" test for Exemption 4). The National Parks test has been adopted, usually without analysis, by most agencies and courts. *See generally* O'Reilly, *supra* note 21 ch. 14.08, p. 14-29.

The Chamber of Commerce believes that the National Parks test of "substantial competitive harm" for Exemption 4 is erroneous and has severely limited the effectiveness of the exemption in achieving the protection for business secrets that Congress intended. The test has been criticized by the business community. *See 1977 House FOIA Hearings, supra* note 3, at 113-19, 157-58, 160, 166-68. The Court should be aware of the pitfall of unintended approval of this contested standard by incidental citation.

[78] *See 1977 House FOIA Hearings, supra* note 3, at 2, 69-70, 100, 127, 164. The FDA not only fails but *refuses* to give notice in many cases, for its own administrative convenience. *Id.* at 69. *See* Pharmaceutical Mfr's Assn. v. Weinberger, 411 F. Supp. 576 (D.D.C. 1976).

given, the short FOIA time restrictions have precluded the submitter from effectively presenting his case.[79] The FOIA does not provide a submitter the right to appeal an adverse agency decision to disclose his records; the statutory time restrictions actually prevent the agencies from delaying disclosure pending an administrative appeal.[80]

As a consequence of the marked increase in agency decisions to disclose confidential business information and the lack of an effective administrative remedy for the submitter, a proliferation of reverse FOIA actions struck the courts beginning in 1974.[81]

E. The Reverse FOIA Cases

Six Courts of Appeals have issued decisions in reverse FOIA cases.[82] Jurisdiction has uniformly been found under 28

[79] *See* discussion at pp. 28-32, *infra.*

[80] In the instant case the Agency denied Chrysler's request for confidentiality and noted:

> The decision may be appealed to the Office of Federal Contract Compliance. . . . However, due to the time constraints imposed by the recent amendments to the Act (Public Law 93-502), we cannot wait for the results of such an appeal. Accordingly, the subject documents . . . will be released five working days after your receipt of this letter.

565 F.2d 1172, 1179 (3rd Cir. 1977).

[81] *See* Brief *Amicus Curiae* of the Chamber of Commerce in Support of the Petition for a Writ of Certiorari at 3, n. 5.

[82] *District of Columbia Circuit;* Charles River Park "A", Inc. v. HUD, 519 F.2d 935 (D.C. Cir. 1975); *see also* Planning Research Corp. v. FTC, 555 F.2d 970 (D.C. Cir. 1977; Sears, Roebuck & Co. v. GSA, 553 F.2d 1378 (D.C. Cir. 1977), *cert. denied,* 46 U.S.L.W. 3215 (1977); Sears, Roebuck & Co. v. GSA, 509 F.2d. 527 (D.C. Cir. 1974).

Third Circuit: Chrysler Corp. v. Schlesinger, 565 F.2d 1172 (3rd Cir. 1977).

Fourth Circuit: Westinghouse Elec. Corp. v. Schlesinger, 542 F.2d 1190 (4th Cir. 1976), *cert. denied, sub nom.* Brown v. Westinghouse Elec. Corp., 431 U.S. 924 (1977).

(Footnote continued)

U.S.C. § 1331.[83] The issues dividing the courts concern the right to a de novo hearing on the question of exemption; the discretion of agency officials to disclose business secrets admittedly within Exemption 4; and the employment of 18 U.S.C. § 1905 as a prohibition of agency disclosure of business secrets.

Charles River Park "A", Inc. v. HUD,[84] supplied the first thorough circuit court analysis of the reverse FOIA suit. The D.C. Circuit considered the reverse FOIA case to be in the nature of an action for a declaratory judgment that the contested records are within Exemption 4.[85] This issue, which is

(Footnote continued)

Fifth Circuit: Pennzoil v. FPC, 534 F.2d 627 (5th Cir. 1976); *see also* Continental Oil Co. v. FPC, 519 F.2d 31 (5th Cir. 1975).

Seventh Circuit: Sears, Roebuck & Co. v. Eckerd, No. 77-1417 (7th Cir. Apr. 25, 1978).

Eighth Circuit: General Dynamics Corp. v. Marshall, No. 77-1192 (8th Cir. Feb. 14, 1978).

The Ninth Circuit issued an opinion in Union Oil Co. v. FPC, 542 F.2d 1036 (9th Cir. 1976) which subsequently was withdrawn.

[83] *See, e.g.,* Planning Research Corp. v. FPC, 555 F.2d 970, 977 (D.C. Cir. 1977) (action arising under FOIA); *see also* Sears, Roebuck & Co. v. GSA, 553 F.2d 1378, 1380 (D.C. Cir. 1977); Westinghouse Elec. Corp. v. Schlesinger, 542 F.2d 1190, 1209-10, 1214 (action arising under 18 U.S.C. § 1905 and FOIA).

Although the Government initially denied jurisdiction in reverse FOIA actions, it now concedes jurisdiction under 28 U.S.C. § 1331. *See* Chrysler Corp. v. Schlesinger, 565 F.2d 1172, 1175 (3d Cir. 1977).

[84] 519 F.2d 935 (D.C. Cir. 1975).

[85] *Id.* at 940.

identical whether raised by a requester in an action to compel production of the records or by a submitter in an action to enjoin production, is determined by the court de novo.[86] If the records are within Exemption 4, and the agency nevertheless decides to disclose them, the court must inquire whether the agency abused its discretion. This inquiry is guided by the Administrative Procedure Act (APA) review standards.[87]

The Fourth Circuit, in *Westinghouse Elec. Corp. v. Schlesinger,* [88] agreed that the determination whether records are within Exemption 4 is to be made de novo,[89] but differed on the consequences of exemption. In that court's opinion, an agency's exercise of discretionary power to release exempt records is subject to restraints imposed by declarations of legislative policy against disclosure.[90] In the case of records within Exemption 4, the legislative policy was to insure that such business secrets would not be disclosed, and thus agency discretion to release them is foreclosed.[91] The court also held that 18 U.S.C. § 1905 may be relied upon to bar agency disclosure of confidential business information that is within the scope of that statute.[92]

The Third, Fifth, Seventh and Eighth Circuits[93] hold that a reverse FOIA case is an action for judicial review of agency action governed by the Administrative Procedure Act, for which de novo review is not available. Review is limited to the agency record to determine whether the agency disclosure

[86] *Id.*

[87] *Id.* at 941. The court originally held that disclosure of records covered by 18 U.S.C. § 1905 would be an abuse of discretion *per se, id.* at 942, but later withdrew this opinion and left the question open. Sears, Roebuck & Co. v. GSA, 553 F.2d 1378 (D.C. Cir. 1977).

[88] 542 F.2d 1190 (4th Cir. 1976).

[89] *Id.* at 1213.

[90] *Id.* at 1197.

[91] *Id.* at 1211.

[92] *Id.* at 1203.

[93] *See* cases cited note 82, *supra.*

decision is arbitrary, capricious or an abuse of discretion.[94] Under this theory, an agency has the discretion to release records which are within Exemption 4 if it finds that disclosure is in the public interest.[95] Finally, these courts hold that 18 U.S.C. § 1905 does not bar disclosure of business records where release is authorized by an agency regulation.[96]

II.

THE ISSUE OF WHETHER BUSINESS RECORDS ARE WITHIN EXEMPTION 4 MUST BE DETERMINED BY THE COURT DE NOVO

A. De Novo Determination Is an Essential Part of the Congressional Scheme

The availability of a de novo judicial determination of whether records are exempt is a fundamental part of the FOIA scheme. The rationale for Congress' provision of a de novo remedy is equally applicable to Exemption 4 cases whether the issue of exemption is raised in an action to compel disclosure or an action to enjoin it.

Congress strongly believed that an agency determination of whether records are exempt should not be conclusive[97] and therefore expressly provided that in an action to compel the production of agency records "the court shall determine the matter de novo."[98]

> That the proceeding must be de novo is essential in order that the ultimate decision as to the propriety of the agency's action is made by the court and

[94] *See, e.g.,* Chrysler Corp. v. Schlesinger, 565 F.2d 1172, 1191-92 (3d Cir. 1977).

[95] *Id.*

[96] *Id.* at 1186-88.

[97] Department of the Air Force v. Rose, 425 U.S. 352, 379 (1976).

[98] 5 U.S.C. § 552(a)(4)(B).

prevent it [sic] from becoming meaningless judicial sanctioning of agency discretion. [99]

The propriety of an agency's classification of records under Exemption 4 involves the same issues in a reverse FOIA case as in an ordinary FOIA action. In cases where suit has been brought to compel production of business records denied by an agency, the submitter has sometimes intervened or assisted the Government by providing testimony or affidavits as to the nature and value of the business information.[100] This evidence is considered by the court de novo. In a reverse FOIA action, the identical issues are presented and the same evidence would be relevant. To ignore this evidence in a reverse FOIA action and apply APA review standards would indeed result in a "meaningless judicial sanctioning of agency discretion," the precise evil Congress intended to avoid in FOIA determinations.

The congressional purpose was to provide de novo review on the *issue* of exemption regardless of who raises it. Any other construction would anomalously produce different results depending solely on whether the submitter or the requester brings the action.

B. The Fallacy of the "Administrative Record"

By limiting the scope of judicial review to the "agency record," the Third Circuit and the other courts that follow this rule have effectively extinguished the protection for business secrets that Congress intended in Exemption 4.

---

[99] S. No. 813, 89th Cong., 1st Sess. 8 (1965). *See also* H.R. Rep. No. 1497,*supra* note 46, U.S. Code Cong. & Ad. News at 2426; Note, *The Freedom of Information Act: A 7 Year Assessment,* 74 Colum. L. Rev. 895, 905 (1974).

[100] *See, e.g.,* Government Sales Consultants v. GSA, C.A. No. 77-1294 (D.D.C. filed July 22, 1977). In this action to compel the production of government contract proposals, the bidders who submitted the proposals intervened and filed extensive affidavits demonstrating the sensitive commercial nature of the materials in issue.

Agency FOIA decisions are required by the Act to be made within ten days.[101] Within this time the agency must locate the requested records, review them in detail to determine whether any of the nine exemptions apply, and issue a written determination. It is a practical impossibility for an agency to make an intelligent decision on the propriety of disclosing business records, based on an informed administrative record, within this ten day period.[102]

Exemption 4, under present judicial interpretations, requires a searching analysis of several factual issues. These may include the measures taken by the submitter to guard the confidentiality of his secrets, the existence of competition, the value and usefulness of the business information to competitors, the availability of the information from public sources, and the investment of time, labor and resources expended by the submitter to develop the information.[103]

It is not feasible for agencies to make an intelligent assessment of these factors within ten days.[104] The agencies themselves do not have the information or the expertise upon which to make informed decisions.[105] Consequently, agencies

---

[101] 5 U.S.C. § 552(a)(6)(A)(i).

[102] Indeed, in the instant case the court found the agency record so inadequate as to be unreviewable. *See* discussion *infra* note 117. The FOIA permits one extension of time up to ten working days in three specified circumstances, none of which would ordinarily be applicable to a request for business records. 5 U.S.C. § 552(a)(6)(B).

[103] *See, e.g.,* National Parks & Conservation Assn. v. Kleppe, 547 F.2d 673 (D.C. Cir. 1976); Sears, Roebuck & Co. v. GSA, 553 F.2d 1378, 1381-83 (D.C. Cir. 1977).

[104] *See 1977 House FOIA Hearings, supra* note 3, at 4-5; Callman, *supra* note 29, § 58.5 (1977 Supp.); Clement, *The Rights of Submitters to Prevent Agency Disclosure of Confidential Business Information: The Reverse Freedom of Information Act Lawsuit,* 55 Tex. L. Rev. 587, 635 (1977).

[105] *See 1977 House FOIA Hearings, supra* note 3, at 5 ("the Agency [EPA] seldom has much information with which to make this

(Footnote continued)

are compelled often to issue Exemption 4 decisions without adequate information on the justification for confidentiality. The SEC, for example, has admitted that it discloses business records which might warrant confidentiality because the FOIA does not allow sufficient time to consider the issue.[106] The EPA, on the other hand, routinely denies requests for business records for which a non-frivolous claim of confidentiality has been made for the same reason: it cannot, within ten days, assess the merits of exemption.[107]

Since the agency's internal knowledge on Exemption 4 factual matters may be limited, it is essential that the submitter, the party whose rights and interests are directly at stake, and the only person with the detailed factual knowledge of the business records necessary to defend their confidentiality,[108] participate fully in the decisionmaking process.

Nevertheless, the FOIA does not require that notice and an opportunity to participate be accorded the submitter and agency practices vary widely.[109] Even when notice is given, the ten day time limitation for decision precludes any effective participation or opportunity to adduce evidence on behalf of the submitter.[110] Thus the mandatory FOIA time restrictions

---

(Footnote continued)
judgment"); Note, *Reverse Freedom of Information Act Suits: Confidential Information In Search Of Protection*, 70 Nw. U. L. Rev. 995, 998-99 (1976); O'Reilly, *Government Disclosure of Private Secrets Under the Freedom of Information Act*, 30 Bus. Law. 1125, 1134, 1146 (1975). *See also* note 110, *infra*, and accompanying text.

[106] *See* note 72, *supra*.

[107] *See 1977 House FOIA Hearings, supra* note 3, at 4.

[108] *See* authorities cited in notes 104 and 105, *supra*.

[109] *Compare* 41 C.F.R. § 60-40 (1977) *with* 32 C.F.R. App. L. (1976). *See also* note 78 *supra*.

[110] *See*, Clement, *The Rights of Submitters to Prevent Agency Disclosure of Confidential Business Information: The Reverse Freedom of Information Act Lawsuit*, 55 Tex. L. Rev. 587, 635 (1977) ("Ten days is clearly insufficient to complete the lengthy process of notifica-

(Footnote continued)

render agency decisions on the exemption for business records inherently inadequate.

Other factors also discredit the integrity of the "administrative record." The agency usually has no direct interest in preserving the confidentiality of private business records, as it would if release of government-produced records were at stake. This lack of interest heightens the FOIA's intentional bias of agency decisionmakers in favor of disclosure. The Act creates a presumption in favor of disclosure [111] and threatens agency officials with sanctions, and the agency itself with assessment of attorney's fees and court costs, for improper refusal to disclose requested records.[112] In fact, the Attorney General, and several agencies in their regulations, require the disclosure of *all* records, even if exempt, unless an *agency* interest will be impaired.[113]

The deficiencies in the agency decisionmaking process were recognized by the Fourth Circuit in *Westinghouse Elec. Corp. v. Schlesinger.* [114] The court rejected the argument that it is "required to render its decision on the administrative record, consisting almost entirely of the agency's *ipse dixit.* . . ." [115]

(Footnote continued)
tion of submitters, preparation of arguments by submitters, and consideration of these arguments by agencies."); Note, *Protection from Government Disclosure—the Reverse FOIA Suit*, 1976 Duke L.J. 330, 360 ("The Act neither makes provisions nor allows sufficient time, for notification of the party who has submitted the information to the agency of a decision to release the documents"); O'Reilly, *supra* note 104, at 1145 ("The new time limits make effective submitter response impossible without substantial prerequest preparation").

[111] *See* EPA v. Mink, 410 U.S. 73, 79 (1973).

[112] *See* 5 U.S.C. § 552(a)(4)(E); 5 U.S.C. § 552(a)(4)(F).

[113] *See* Attorney General's May 5, 1977 Memorandum on FOIA, *reprinted in 1977 Senate FOIA Hearings, supra* note 17, at 217. The Labor Department regulations at issue in the instant case provide a "blanket waiver" of any authority the Government might have to withhold exempt information. *See* 41 C.F.R. § 60-40.2(a) (1977), Chrysler Corp. v. Schlesinger, 565 F.2d 1172, 1177 (3rd Cir. 1977).

[114] 542 F.2d 1190 (4th Cir. 1976).

[115] *Id.* at 1207.

> [T]here is always the real risk that the agency itself will be delinquent in asserting the rights of the private party. After all, it could not care less about protecting the competitive position of a supplier of information. That is no part of its responsibility. Neither does it have . . . in most instances, sufficient knowledge to assert properly the private party's right to confidentiality. [116]

The Fourth Circuit's observation is borne out by the fact that in almost every instance in which a court has held that review of a reverse FOIA action should be based on an administrative record, it has also found the administrative record so deficient as to be unreviewable.[117] Since the FOIA itself inherently precludes an agency from compiling an informed "administrative record," the congressional protection intended in Exemption 4 can only be achieved by a de novo proceeding in the District Court.

C. De Novo Review Is Required Under the Administrative Procedure Act

Section 10 of the APA, 5 U.S.C. § 706, provides that review of agency action shall be de novo when agency fact-finding procedures in an adjudicatory action are inadequate. *See Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 415 (1971). An agency determination to disclose business

---

[116] *Id.* at 1213.

[117] *See, e.g.,* Chrysler Corp. v. Schlesinger, 565 F.2d 1172, 1192 (3rd Cir. 1977) ("Our decision to remand this case is based solely on the inadequacy of the administrative record under review"); General Dynamics Corp. v. Marshall, *supra* note 82, slip. op. at 13, n.8 (In the present case . . . the agency record is too ambiguous for the court to comprehend the rationale of the agency's holding"); Pennzoil Co. v. FPC, 534 F.2d 627, 632 (5th Cir. 1976) ("We feel that [the FPC's] brief statement is inadequate as an articulation of a finding that disclosure of this information serves a legitimate regulatory function"); Babcock & Wilcox Co. v. Rumsfeld, 70 F.R.D. 595, 602 (N.D. Ohio 1976).

secrets, which may impair or destroy their value, is an adjudicatory action. It has been demonstrated in Part II B, *supra,* that the fact-finding procedures in agency decisionmaking under Exemption 4 are inherently inadequate. Under the APA criteria, therefore, de novo review of the agency disclosure decision is required.

Adjudicatory actions are those in which private property interests would be "exceptionally affected, in each case upon individual grounds" by government action. *Bi- Metallic Inv. Co. v. State Board of Equalization,* 239 U.S. 441, 446 (1915).[118] They are characterized by issues which require resolution of adjudicatory-type facts:

> Facts pertaining to the parties and their businesses and activities, that is, adjudicative facts, are intrinsically the kind of facts that ordinarily ought not to be determined without giving the parties a chance to know and to meet any evidence that may be unfavorable to them, that is, without providing the parties an opportunity for trial.[119]

The agency decisionmaking process in Exemption 4 cases is clearly adjudicatory. In *Sears, Roebuck & Co. v. GSA,* [120] the disclosure of EEO-1 reports was in issue. The court observed:

> The question of what this data in the reports would mean to an intelligent competitor is a factual issue. The answer to that issue is in the nature of a fact, a factual conclusion if you prefer, but still partaking of the nature of fact.[121]

---

[118] *See also* Londoner v. Denver, 210 U.S. 373, 385-86 (1908).

[119] 1 K. Davis, Administrative Law Treatise § 7.02, at 413 (1958).

[120] 553 F.2d 1378 (1977).

[121] *Id.* at 1382.

In this case Sears claimed that the information in dispute could not be obtained from commercial publications, research services or other government sources, nor could on-site inspections of Sears' retail facilities yield the same type or quality of information. Sears alleged that the information would be of great use to a competitor in determining where to locate future retail stores, and also would reveal "promotable" individuals who could be induced to leave Sears and move to a competitor. The Government contested these factual issues. The court found:

> Where there is a conflict in the affidavits as to what adverse consequences will flow from the revelation of the facts contained in the documents sought to be disclosed, then it appears that there is indeed a conflict regarding very material facts which calls for some type of adversary procedure.[122]

Disputed factual issues regarding the confidentiality of business records will be present in most Exemption 4 cases.[123] The agencies themselves acknowledge that the nature of their inquiry is one which requires resolution of adjudicative facts unique to the business and situation of the submitter in each instance.[124] The adjudicatory nature of the proceeding can hardly be disputed.

The private interests at stake are clearly more than de minimis.[125] Information in reverse FOIA cases often consists of

---

[122] *Id.* Similar issues were present and were resolved by the trial court after hearing in the instant case. Chrysler Corp. v. Schlesinger, 565 F.2d 1172, 1182 (3rd Cir. 1977).

[123] *See, e.g.*, the cases cited in note 82, *supra*.

[124] *See, e.g.*, testimony of EPA in *1977 House FOIA Hearings, supra* note 3, at 4-5.

[125] *See* Goss v. Lopez, 419 U.S. 565, 576 (1975) ("As long as a property deprivation is not *de minimis*, its gravity is irrelevant to the question whether account must be taken of the Due Process clause.").

trade secrets and other business information of substantial commercial value.[126] This value may be lost entirely by disclosure.

The lack of agency fact-finding procedures capable of providing a fundamental fair hearing in which to defend the commercial interests at stake has been demonstrated. Accordingly, under 5 U.S.C. § 706, de novo judicial review of agency decisions under Exemption 4 to disclose business records must be provided.

D. The Congressional Purpose of Exemption 4 Requires a Right to a De Novo Determination

Where the right to de novo review of administrative action is not provided expressly by statute, it will nevertheless be implied where this will give effect to the clear legislative intent. In the case of Exemption 4, Congress made it clear that the privacy interest in business secrets is no less important than the general FOIA disclosure policy. The same right to a de novo hearing provided in FOIA disclosure actions therefore must be extended also to actions to preserve confidentiality interests protected by Exemption 4.

In *Chandler v. Roudebush,* 425 U.S. 840 (1976), the Court placed critical reliance upon legislative intent in deciding whether the right to trial de novo statutorily provided to one class of aggrieved persons should be provided to a related class in the absence of an express statutory direction. The issue presented in *Chandler* was whether the Equal Employment

---

[126] *See* Kewanee Oil Co. v. Bicron Corp., *supra* note 28; Telex Corp. v. IBM, *supra* note 16; FDA testimony regarding safety and efficacy data for drug applications, *1977 House FOIA Hearings, supra* note 3, at 67-97. The Third Circuit's holding, permitting the impairment or destruction of Chrysler's business secrets without provision of an adjudicatory hearing in an administrative or judicial forum, raises substantial due process questions. *See* cases cited *supra* notes 118 and 125, and the Third Circuit's opinion at 565 F.2d at 1193.

Opportunity Act of 1972 [127] gave federal employees the same right to a trial de novo of employment discrimination claims as "private-sector" employees enjoyed under Title VII of the Civil Rights Act of 1964.[128] The Court found two legislative concerns in the history of the 1972 Act to be dispositive: the inadequacy of available administrative remedies, and the congressional purpose to protect federal employees against employment discrimination.[129] These concerns dictated that the 1972 Act be interpreted to provide federal employees the same right to a trial de novo as had been expressly bestowed on private sector employees.[130]

By analogy, the FOIA expressly provides a right to de novo judicial consideration of a disputed case under Exemption 4 in a civil action to compel disclosure of business records. As in *Chandler,* the legislative history of the FOIA demonstrates that the right to a de novo hearing stemmed from Congress' belief that the administrative remedy itself is inadequate. De novo consideration was provided so that court actions are "prevented from becoming meaningless judicial sanctioning of agency discretion."[131]

Second, as in *Chandler,* the FOIA evinces a legislative purpose to protect the rights of submitters against disclosure of their business secrets.[132] In the face of a statute whose primary objective is disclosure, Congress expressly stated that the protection of privacy rights was of no less importance:

> At the same time that a broad philosophy of "Freedom of Information" is enacted into law, it is necessary to protect certain *equally important rights of privacy* with respect to certain information in Government files. . . . [133]

---

[127] Pub. L. 92-261, 86 Stat. 103.

[128] 78 Stat. 253, *as amended,* 42 U.S.C. § 2000(e) *et seq.* (1970 and Supp V 1975).

[129] 425 U.S. at 848-49.

[130] *Id.* at 861.

[131] S. Rep. No. 813, 89th Cong., 1st Sess. 8 (1965).

[132] *See* pp. 15-18, *supra.*

[133] S. Rep. No. 813, *supra* note 131, at 3 (emphasis added).

Since Congress considered an administrative proceeding inadequate for resolution of Exemption 4 issues, and desired to protect privacy rights equally with disclosure rights, the clear legislative purpose requires that the same right to a de novo determination which exists in an action to compel disclosure of business information should be extended to an action to preserve their confidentiality.[134]

III.

BUSINESS SECRETS ADMITTEDLY WITHIN EXEMPTION 4 SHOULD NOT BE DISCLOSABLE AT THE DISCRETION OF AGENCY OFFICIALS

A. Exemption 4 Forecloses Agency Discretion to Disclose Exempt Business Secrets

Exemption 4 embodies a carefully considered congressional policy to protect the privacy of business secrets. As explained in Part I, *supra,* the exemption is an integral part of the web of historical federal and state legal protection for confidential business information, founded upon the belief that such protection will foster innovation, industrial efficiency, and honest commercial practices. To grant agency FOIA officials the

---

[134] The Fourth Circuit reached the same conclusion in Westinghouse Elec. Corp. v. Schlesinger, 542 F.2d 1190, 1213 (4th Cir. 1976):

> Should not the person who is threatened with harm through a disclosure, which the Congress has indicated clearly is against the public policy as expressed in the FOIA itself, be the proper one to assert that right . . . in an equity action in which he can have a *de novo* trial? The envious competitor or the curious busybody demanding access to that private information has the right to such a *de novo* trial. The Act gives it to him. But is not the same right to be implied, when the supplier . . . seeks what may be regarded as correlative relief?

discretion, as did the court below, to disclose these business secrets whenever they find it to be "desirable"[135] is to nullify this policy and eviscerate the exemption.

A number of courts have reasoned that since the FOIA "does not apply" to exempt information,[136] the decision whether to disclose them resides in the discretion of the agency, to be reviewed under the APA only for arbitrary or capricious action, or abuse of discretion.[137] The error in this analysis lies in the conclusion that because the FOIA "does not apply" to exempt records, agencies are free to disclose them. In the case of Exemption 4, the contrary is true.

Each FOIA exemption was carefully designed to protect a particular interest in confidentiality. All agency records are presumptively disclosable, but if they fall within an exemption, they are presumptively non-disclosable because they satisfy an interest in confidentiality which Congress concluded outweighs the general interest in disclosure. The Senate Report provides that the Act "sets up workable standards for what records should and should not be open to public inspection."[138] Congress determined that business records which fall within Exemption 4 should not be open to public inspection. Agency discretion to disclose such exempt records is foreclosed, *unless* it is the agency itself which is the intended beneficiary of the exemption.

The person for whose benefit the privacy interest was created may waive the protection if he chooses to do so. The distinction has been drawn between those exemptions which protect agency interests, and those which protect private interests.[139] The exemptions for national security, personnel records, intra and inter-agency memoranda and investigatory records

---

[135] Chrysler Corp. v. Schlesinger, 565 F.2d 1172, 1178, 1192, (3rd Cir. 1977).

[136] 5 U.S.C. § 552(b).

[137] *See, e.g.*, Chrysler Corp. v. Schlesinger, *supra* note 135, at 1192.

[138] S. Rep. No. 813, *supra* note 131, at 5.

[139] *See* Note, *Developments Under The Freedom of Information Act-1974*, 1975 Duke L.J. 416, 431-32:

> Where the exemption was intended to protect the asserted private interests, an agency should respect the desire of the person submitting the information, and a court, consistent with the overall policy of the FOIA, may order the agency to withhold that information.

Other commentators recognize the distinction between private records and government records. *See* Note, *A Review of the Fourth Exemption of the Freedom of Information Act*, 9 Akron L. Rev. 673, 694 (1976):

> The purpose of the Freedom of Information Act was to protect the people's right to obtain information about their government, to know what their government is doing, and to obtain information about government activities and policies. The Freedom of Information Act was not enacted for the purpose of enabling the public to obtain information about individuals and corporations, about what those individuals and corporations are doing, or about what their activities and policies are. [Footnotes omitted.]

See also O'Reilly, *Government Disclosure of Private Secrets Under the Freedom of Information Act*, 30 Bus. Law. 1125, 1134 (1975):

> [t]here is a significant policy justification for not 'giving away for free' what private industry, *not Government*, has paid for. Government's duty to reveal *its* inner workings provides no similar justification for the disclosure of private parties' operations. [Emphasis in original.]

protect governmental confidentiality interests.[140] The exemptions for business secrets, personal privacy, financial institutions and geological data were intended to protect private confidentiality interests.[141] An agency may, in its discretion, waive the protection of an exemption intended for its own benefit, but such is not the case with Exemption 4.

In *Westinghouse Elec. Corp. v. Schlesinger,* [142] the court agreed that Congress intended to foreclose agency discretion to reveal business secrets within Exemption 4:

> This provision in the Act was more than a simple exemption; it represented an express affirmation of a legislative policy favoring confidentiality of *private* information furnished government agencies, the disclosure of which might be harmful to *private* interests. It was manifestly intended to protect that private interest. And when a statute, whether phrased in the form of an exemption or not, grants a private party protection from disclosure, it carries with it an implied right in the private party to invoke the equity powers of a court to assure him that protection. It matters not that the statute does not in express terms accord him that right.[143]

B. Agency Officials Should Not Be Permitted to Engage in "Interest Balancing" Where Congress Has Already Performed That Function

The Third Circuit in *Chrysler,* and the other courts which follow this approach, permit agency FOIA officials to disclose

---

[140] *See* Exemptions 1, 2, 5 and 7, respectively, 5 U.S.C. §§ 552(b)(1)(2)(5) & (7).

[141] *See* Exemptions 4, 6, 8 and 9, respectively, 5 U.S.C. §§ 552(b)(4), (6), (8) and (9). Exemption 3, 5 U.S.C. § 552(b)(3), may protect both private and governmental confidentiality interests depending upon the particular statute in question.

[142] *Supra* note 88.

[143] *Id.* at 1211 (Emphasis in original).

business secrets found to be within Exemption 4 if, after balancing what they perceive to be the private confidentiality interests against the public interest in disclosure, they deem in their discretion that disclosure is desirable.[144] Permitting agency officials to engage in interest balancing is erroneous, for it ignores the fact that Congress, in defining the scope of the FOIA exemptions, has already balanced the competing public and private interests, and has decided that in the case of business secrets qualifying under Exemption 4, the privacy interests should prevail.

While the purpose of the FOIA was to promote disclosure, Congress recognized that it was equally important to protect certain legitimate interests in confidentiality and privacy.[145] A substantial portion of the congressional effort in drafting the FOIA was consumed with defining those confidentiality interests in the form of the nine exemptions. That process comprehended the balancing of competing interests in confidentiality and disclosure. The Senate Report states:

> It is not an easy task to balance the opposing interests, but it is not an impossible one either. It is not necessary to conclude that to protect one of the interests, the other must, of necessity, either be abrogated or substantially subordinated. Success lies in providing a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure.[146]

The exemptions themselves embody Congress' policy decisions on how the competing interests in disclosure and confidentiality should be balanced. They provide "workable formulas" which if followed by the agencies will lead to the

---

[144] *See* Chrysler Corp. v. Schlesinger, *supra* note 135, at 1192; Charles River Park "A" Inc. v. HUD, *supra* note 84, at 943; Pennzoil Co. v. FPC, *supra* note 82, at 631-32; General Dynamics Corp. v. Marshall, *supra* note 82, slip op. at 12.

[145] *See* S. Rep. No. 813, *supra* note 131, at 3.

[146] *Id.*

proper proportions of disclosure and withholding. Unless provided for specifically in an exemption, there is no place for further "interest balancing" by agency officials once material is found to be within an exemption. This practice can lead only to distortion and circumvention of the deliberate interest balancing already performed by Congress.

In *FAA v. Robertson,* 422 U.S. 255 (1975), the Court discussed the two aspects of the Act. In one, it seeks to open agency records to greater public access; in the other it seeks to preserve "undeniably essential confidentiality." *Id.* at 261. It is axiomatic, the Court declared, that both of these purposes are to be given effect. To give effect to these competing policies, Congress created nine exemptions drafted to provide a "workable and balanced formula" for determining which records should be available to the public and which must be maintained in confidence. *Id.* at 262.[147]

A serious flaw in the reasoning of the Third Circuit lies in the erroneous perception that the public policy favoring protection of business secrets can be given proper effect through a case-by-case approach to interest balancing for each of the thousands of requests for business records under the FOIA. The public policy protecting business secrets is based on the *collective* adverse impact that disclosure of the mass of confidential business information in government files would have

[147] In Westinghouse, *supra* note 88, the court commented:

> In summary, the Act was intended, to use the language of the Senate report, to set 'up workable standards for what records should and should *not* be open to public inspection.' [Emphasis in original.]

542 F.2d at 1211. The court analyzed the balancing performed by Congress in Exemption 4:

> In enacting such exemption, the Congress had balanced the right to public disclosure against the right of the private party to protection and had opted for the right to privacy in favor of the private interest.
>
> *Id.*

on commerce. Considered one item at a time, disclosure of a single company's profits, advertising policies or formulas for the single year or single product in issue may not appear so drastic to an agency FOIA official. Collectively, however, the consequences of numerous such disclosures can be quite significant, yet agency personnel cannot possibly take into account the cumulative impact while focusing on the public interest involved in a single case.[148]

[148] The same policy justification which protects the "deliberative process" under Exemption 5 against piecemeal inquiry into the individualized harm from disclosure of intra or inter-agency memoranda, also is applicable to Exemption 4. The impracticality of assessing harm on a case-by-case basis was pointed out by the FDA general counsel:

> The difficulty we have with the Attorney General's instruction [to withhold information only when disclosure is demonstrably harmful] is that it is very difficult in some cases to make a showing of demonstrable harm, although you know that ultimately some harm may occur. The best example of that I think would be some types of internal agency communications, advice from agency lawyers to the Commissioner, for example.
>
> If some asks for those, it might be fery difficult in the particular context of that request to demonstrate harm that would occur if that memo were released. But if one adopted a practice of routinely releasing memorandums from agency lawyers to the Commissioner or other agency personnel to each other, then over a relatively short period of time I think you would find an awful lot of communication taking place on the phone and in person and people being less willing to reduce thoughts, ideas and legal advice to writing.
>
> * * *
>
> It is difficult to show harm in a particular case. All you can do is make the general case of harm.

1977 House FOIA Hearings, supra note 3, at 75 (statement of Stuart Pape).

One of the most insidious evils that the FOIA was intended to remedy was the use of the phrase "in the public interest" as a basis for agency decisions to withhold records. Prior to the FOIA, Section 3 of the Administrative Procedure Act, 5 U.S.C. § 1002, permitted withholding of records when secrecy was "in the public interest." This language was considered by Congress to be "full of loopholes" and to present such a "lack of standards" that an agency official could do whatever he wished:[149]

> It would require almost no effort for any official to think up a reason why a piece of information should be withheld . . . because it was in the 'public interest'.[150]

Congress declared, "It is the purpose of the present bill to eliminate such phrases . . .,"[151] because this standard "admits of no clear delineations," "has served in many cases to defeat the very purpose for which it was intended," "has caused widespread public dissatisfaction and confusion,"[152] and was generally so "vague" and "undefinable" as to permit repeated administrative abuse.[153] Indeed, this Court opined in *FAA v. Robertson:* [154]

> The Freedom of Information Act was enacted in order to impose objective and easily applicable statutory disclosure standards in place of relatively amorphous standards such as the 'public interest,' behind which the most self-serving motives for nondisclosure of information could be concealed. [155]

---

[149] S. Rep. No. 813, 89th Cong., 1st Sess. at 3, 5.

[150] *Id.*

[151] *Id.* at 3.

[152] *Id.* at 8.

[153] H.R. Rep. No. 1497, 89th Cong., 2d Sess. (1966), 1966 U.S. Code Cong. & Ad. News 2419, 2422, 2426-27.

[154] 422 U.S. 255 (1975).

[155] *Id.* at 268 (Stuart, J. concurring). *See also* EPA v. Mink, 410 U.S. 73, 79 (1973).

Congress plainly desired to put to rest the phrase "in the public interest" as a device for circumventing disclosure of public records. It is equally clear that Congress did not intend to reactivate this unworkable standard as a basis for circumventing the protections it provided in Exemption 4.

There is a further reason why interest balancing by agency officials is not permitted in Exemption 4 cases. Where Congress intended agency officials to balance competing disclosure and privacy interests in deciding whether to make records public, it indicated this explicitly both in the language of the particular exemption involved and in its legislative history.

Exemption 6, which relates to personnel and medical files, is the only one of the nine exemptions for which Congress permitted interest balancing to determine whether exemption is proper. Exemption 6 protects personnel and medical files "the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."[156] Unlike Exemption 4, the harms from disclosure in Exemption 6 cases can *only* be determined upon a case-by-case interest balancing analysis. The Senate Report provides:

> The phrase 'clearly unwarranted invasion of personal privacy' enunciates a policy that will involve a balancing of interests between the protection of an individual's private affairs from unnecessary public scrutiny, and the preservation of the public's right to governmental information.[157]

Interpreting this exemption, this Court observed:

> Congress sought to construct an exemption that would require a balancing of the individual's right of privacy against the preservation of the basic purpose of the Freedom of Information Act 'to open agency action to the light of public scrutiny.'

Department of the Air Force v. Rose, 425 U.S. 352, 372 (1976).

---

[156] 5 U.S.C. § 552(b)(6).

[157] S. Rep. No. 813, 89th Cong., 1st Sess. 9.

In stark contrast to the language and legislative history of Exemption 6, Exemption 4 provides no hint that Congress intended agency officials to balance competing interests in determining whether to disclose business secrets. On the contrary, it is clear that Congress provided a formula in Exemption 4 which already balanced those interests in the manner Congress deemed most wise.

Finally, as discussed at length in Part II B *supra,* the inherent statutory limitations on the agency FOIA decisionmaking process effectively preclude agency officials from ascertaining the private interests in business secrecy which are at stake in Exemption 4 cases. The FOIA time restrictions, which deny the submitter a fair opportunity to present evidence, and the statutory bias in favor of disclosure deter the agency official from identifying the strength of the confidentiality interest. It is axiomatic that if the agency cannot properly assess the need for confidentiality, it cannot possibly engage in a meaningful balancing of the competing interests which may be present.

IV.

BUSINESS SECRETS WITHIN 18 U.S.C. § 1905 MAY NOT BE DISCLOSED UNDER THE FOIA

Agency officials are prohibited from disclosing business secrets provided to government agencies by the Trade Secrets Act, 18 U.S.C. § 1905. This statute makes it a crime for an agency employee to disclose, to any extent not authorized by law, any information which relates to, *inter alia:*

> Trade secrets, processes, operations, style or work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person. . . .

In the instant case the District Court held that a portion of the business records in issue were within § 1905, and that since

the Agency's regulations forbade the release of information covered by this statute, these records could not be disclosed. *Chrysler Corp. v. Schlesinger,* 412 F. Supp. 171, 177-78 (D. Del. 1976). The Court of Appeals held that agency disclosure regulations promulgated under the so-called housekeeping statute, 5 U.S.C. § 301, may authorize the disclosure of business secrets admittedly within § 1905.[158]

The Third Circuit's holding permits agencies to avoid the proscriptions of § 1905 simply by passing regulations to that effect, and thus renders the law impotent. Correctly analyzed, § 1905 is a mandatory non-disclosure statute within Exemption 3 of the FOIA, and cannot be circumvented by agency housekeeping regulations under 5 U.S.C. § 301.

A. Section 1905 Is a Statute Within Exemption 3 of the FOIA

In *FAA v. Robertson,* 422 U.S. 255 (1975), the Court, interpreting FOIA Exemption 3, held that the FOIA did not repeal by implication all pre-existing statutes which restricted public access to specific government records. Rather, these nondisclosure statutes were found to be encompassed by Exemption 3. 422 U.S. at 265. Although at that time Exemption 3 provided that records need not be disclosed if specifically exempted from disclosure by statute,[159] the exemption subsequently was amended in a manner which modified the effect of the holding in *Robertson.* [160] The amendment restricted Exemption 3 to matters that are

> specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular

---

[158] 565 F.2d 1172, 1186 (3rd Cir. 1977).
[159] 5 U.S.C. § 552(b)(3) (1970).
[160] *See* H.R. Rep. No. 94-1441, 94th Cong., 2d Sess. 25 (1976).

> criteria for withholding or refers to particular types of matters to be withheld.[161]

The purpose of this amendment was to restrict Exemption 3 to statutes in which the concern for secrecy emanated from Congress rather than from the agency.[162]

Although it is necessary to satisfy only one of the two criteria in Exemption 3 as amended, § 1905 satisfies both. Since it is an absolute criminal prohibition, it leaves agencies with no discretion on the issue of whether to withhold the named categories of business secrets. It also establishes particular criteria and types of materials to be withheld, such as trade secrets and information revealing income and profits. There can be no doubt that under either of the new criteria, § 1905 is a statute encompassed by Exemption 3.

B. Agency Regulations May Not Authorize Disclosure of Business Secrets Within Section 1905

The Third Circuit's holding that agency regulations promulgated pursuant to the housekeeping statute, 5 U.S.C. § 301, may authorize disclosure of business secrets admittedly within § 1905, does not withstand analysis.

Section 301 provides in pertinent part:

> The head of an Executive Department or Military Department may prescribe regulations for . . . the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public.

---

[161] 5 U.S.C. § 552(b)(3).

[162] Note, *The Effect of the 1976 Amendment to Exemption 3 of the Freedom of Information Act,* 76 Colum. L. Rev. 1029, 1042 (1976).

The housekeeping statute, whose antecedents date back to 1789,[163] clearly was not intended to enable agencies to circumvent subsequent specific non-disclosure statutes such as § 1905 by the mere promulgation of regulations to that effect. This is confirmed by the legislative history of the 1958 amendment to the housekeeping statute.

The 1958 amendment added the second sentence of the above quoted portion of § 301. The Senate and House Reports explain that the amendment would not affect other statutes which authorize agencies to withhold information or forbid agencies to disclose information.[164] The sponsor of the amendment, Congressman Moss, stated explicitly that the amendment

> does not go to any other statutory authority which confers upon the departments and agencies of Government the right to withhold information. . . . It does not affect the confidential status of information given to the Government and carefully detailed in title 18, United States Code, section 1905. . . .[165]

The D.C. Circuit, citing this legislative history, specifically agreed that "Section 301 does not authorize regulations limiting the scope of section 1905."[166] Moreover, the legislative history of the FOIA discloses that at the time of its adoption in 1966, agencies considered themselves bound not to disclose

---

[163] *See* Act of July 27, 1789, Ch. 4, § 4, 1 Stat. 28; Act of Aug. 7, 1789, Ch. 7, § 4, 1 Stat. 49; Act of April 30, 1798, Ch. 35, § 3, 1 Stat. 553; Act of Sept. 2, 1789, Ch . 12, § 4, 1 Stat. 65. The Act of July 27, 1789 provides in pertinent part:

> [T]he Secretary for the Department of Foreign Affairs . . . shall . . . be entitled to have the custody and charge of all records, books and papers in the Office of the Secretary of the Department of Foreign Affairs. . . .

[164] *See* S. Rep. No. 1621, 85th Cong., 2d Sess. 9 (1958); H.R. Rep. No. 1461, 85th Cong., 2d Sess. 12 (1958).

[165] 104 Cong. Rec. 6550 (1958).

[166] Charles River Park "A", *supra* note 84, at 942-43.

information within the proscription of § 1905, notwithstanding the existence of 5 U.S.C. § 301.[167]

Congress therefore did not intend, through the enactment of this broad statute which permits the heads of agency departments simply to promulgate regulations for the orderly maintenance of their records and property, also to permit them to evade the specific proscriptions against disclosure of business secrets in § 1905.

---

[167] *See, e.g., 1964 Senate FOIA Hearings, supra* note 13, at 253 (Department of Commerce comments), 268-71 (Treasury Department comments).

CONCLUSION

The Chamber of Commerce respectfully requests the Court to rule that the Court of Appeals erred in holding that Chrysler's action was confined to review of the agency record; that Chrysler was entitled to a de novo determination as to whether its business records were within FOIA Exemption 4 or 18 U.S.C. § 1905; and that Respondents had no discretion to disclose any portions of Chrysler's business records which the District Court found, after hearing, to be within Exemption 4 or 18 U.S.C. § 1905. The Court is requested to reverse the judgment of the Court of Appeals and to reinstate the permanent injunction entered by the District Court, modified as indicated herein.

Respectfully submitted,

ROBERT L. ACKERLY
THOMAS L. PATTEN
KENNETH W. WEINSTEIN

SELLERS, CONNER & CUNEO
1625 K Street, N.W.
Washington, D.C. 20006
Attorneys for the Chamber of Commerce of the United States

Of Counsel:
LAWRENCE B. KRAUS
General Counsel

CHAMBER OF COMMERCE OF THE UNITED STATES
1615 H Street, N.W.
Washington, D.C. 20062

STANLEY T. KALECZYC

NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062

June 8, 1978

Supreme Court, U. S.
FILED
AUG 4 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-922

CHRYSLER CORPORATION,

Petitioner,

v.

HAROLD BROWN, et al.,

Respondents.

BRIEF OF AMICI CURIAE CONSUMER FEDERATION OF AMERICA, WOMEN'S EQUITY ACTION LEAGUE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND AND WOMEN'S LEGAL DEFENSE FUND

CHARLES E. HILL
A. BRYNNE MAYERSON
600 New Jersey Avenue, N.W.
Washington, D.C. 20001
(202) 624-8390

Attorneys for Amici Curiae

THE CASILLAS PRESS, INC.–1717 K Street, N. W.–Washington, D. C.–223-1220

TABLE OF CONTENTS

	Page
INTEREST OF AMICI CURIAE	1
ISSUES DISCUSSED BY AMICI . . .	3
CONTEXT AND SIGNIFICANCE OF ISSUES POSED	4
SUMMARY OF THE ARGUMENT	17
ARGUMENT	20
I. 18 U.S.C. § 1905 DOES NOT APPLY TO THE TYPE OF INFORMATION IN DISPUTE HERE AND, IN ANY EVENT, DISCLOSURE IS "AUTHORIZED BY LAW" WITHIN THE MEANING OF SECTION 1905	20
A. The Legislative History Of 18 U.S.C. § 1905 Clearly Demonstrates That The Equal Employment Information Here Does Not Fall Within The Scope Of That Section	21
B. Disclosure Of The Requested Information Is "Authorized By Law" Within The Meaning Of Section 1905	32

Page

1) Validly Adopted Agency Regulations Provide "Authorization By Law" For Disclosure Within The Meaning of Section 1905 33

2) 5 U.S.C. § 301 And Executive Order 11246 Each Provide Statutory Authority For The OFCC Disclosure Regulations 40

II. 18 U.S.C. § 1905 DOES NOT QUALIFY AS AN EXEMPTION 3 STATUTE AND THUS DOES NOT EXEMPT FROM DISCLOSURE INFORMATION WHICH WOULD OTHERWISE BE REQUIRED TO BE DISCLOSED UNDER THE FOIA 48

III. THE PROPER STANDARD OF JUDICIAL REVIEW IN REVERSE FOIA CASES IS WHETHER, BASED ON THE ADMINISTRATIVE RECORD, THE AGENCY'S DECISION WAS "ARBITRARY AND CAPRICIOUS" 59

CONCLUSION 72

APPENDIX A

APPENDIX B

TABLE OF AUTHORITIES

CASES:

Administrator, FAA v. Robertson, 422 U.S. 255 (1975) 51, 53

Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975) 25

American Jewish Congress v. Kreps, No. 76-1559 (D.C. Cir., March 15, 1978) 53, 57, 58

Boske v. Comingore, 177 U.S. 459 (1900). 41

Camp v. Pitts, 411 U.S. 138 (1973). 67

Cass v. United States, 417 U.S. 72 (1974) 25

Charles River Park "A", Inc. v. HUD, 519 F.2d 935 (D.C. Cir. 1975). . . . .13, 38, 42, 48, 50 . . . . . 52, 57, 62, 63

Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971) 61, 62

City of Greenwood v. Peacock, 384 U.S. 808 (1966) 25

Crown Central Petroleum Corp. v. Kleppe, 424 F. Supp 744 (D. Md. 1976) 14, 54

Crown Central Petroleum Corp. v. Kleppe, 13 FEP cases 1337 (W.D. Tenn. 1976) 65

Department of Air Force v. Rose, 425 U.S. 352 (1976) . . . 6, 7

EPA v. Mink, 410 U.S. 73 (1973). 6, 7

FCC v. Schreiber, 381 U.S. 279 (1965) 45, 46

Fourco Glass Co. v. Transmirra Corp., 353 U.S. 222 (1957). 25, 31

General Dynamics Corp. v. Dunlop, 427 F. Supp 578 (E.D. Mo. 1976), vacated sub. nom. General Dynamics Corp. v. Marshall 572 F.2d 1211 (8th Cir. 1978). . . . . 13, 14 . . . . . .38, 42, 60, 65

General Services Administration v. Benson, 415 F.2d 878 (9th Cir. 1969) 34

G. L. Christian & Associates v. United States, 320 F.2d 345 (U.S. Ct. Cl. 1963) 34

Grumman Aircraft Engineering Corp. v. The Renegotiation Board, 425 F.2d 578 (D.C. Cir. 1970) 57

GTE Sylvania, Inc. v. Consumer Product Safety Commission, 404 F.Supp. 352(D. Del. 1977) 14

Huddleston v. United States, 415 U.S. 814 (1974) 22

Hughes Aircraft Co. v. Schlesinger, 384 F. Supp. 292 (C.D. Cal. 1974). 14

Isbrandtsen-Moller Co. v. United States, 300 U.S. 139 (1937). 47

Laughlin v. United States, 474 F.2d 444 (D.C. Cir. 1972), cert. denied, 412 U.S. 941 (1973) 33

M.A. Schapiro & Co. v. SEC, 339 F. Supp. 467 (D.D.C. 1972) 57

Maryland Casualty Co. v. United States, 251 U.S 342 (1920). 33

McCoy v. Weinberger, 386 F. Supp. 504 (W.D. Ky. 1974) 65

Metropolitan Life Ins. Co. v. Usery, 426 F. Supp. 150 (D. D.C. 1976), cert. before judgment denied sub nom. Prudential Ins. Co. v. National Org. for Women, 97 S. Ct. 2198 (1977). 14, 65

Muniz v. Hoffman, 422 U.S. 454 (1975). . . . 25, 27, 28, 30, 31

National Broadcasting Co., Inc. v. United States, 319 U.S. 190 (1943). 60

National Parks & Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1974), after remand, National Parks & Conservation Ass'n v. Kleppe, 547 F.2d 673 (D.C. Cir. 1976). .15, 19 . . . . . 48, 51, 57

Norwegian Nitrogen Co. v. United States, 288 U.S. 294 (1933). 45, 47

Oklahoma Press Co. v. Walling, 327 U.S. 186 (1946) 46

Parkridge Hosp., Inc. v. Blue Cross & Blue Shield, 430 F. Supp. 1093 (E.D. Tenn. 1977), appeal pend., No. 77-1576 (6th Cir. June 7, 1977) 65

Paul v. United States, 371 U.S. 245 (1963). 33

Pennzoil Co. v. FPC, 534 F.2d 627 (5th Cir. 1976) 60

Public Utilities Commission of California v. United States, 355 U.S. 534 (1958) 33

Rewis v. United States, 401 U.S. 808 (1970). 22

Rodway v. United States Dept. of Agriculture, 514 F.2d 809 (D.C. Cir. 1975). 33

Sears, Roebuck & Co. v. Eckerd, No. 77-1417 (7th Cir. April 25, 1978) 35, 38, 42, 60

Sears, Roebuck & Co. v. GSA 384 F. Supp. 996 (D.D.C. 1974), stay dissolved, 409 F.2d 527 (D.D. Cir. 1974), aff'd, 402 F. Supp 378 (D.D.C. 1974), rev'd in part, aff'd in part and remanded, Sears, Roebuck & Co. v. GSA, 553 F.2d 1378 (D.C. Cir. 1977). 13, 51, 54, 65

Tagg Bros. & Moorhead v. United States, 280 U.S. 420 (1930). . . . 60

Tennessee Valley Authority v. Hill, 46 U.S.L.W. 4673 (June 15, 1978). 17

Thorpe v. Housing Authority of City of Durham, 393 U.S. 268 (1969) 45

Tidewater Oil Co. v. United States, 409 U.S. 151 (1972). . . . 25

Udall v. Tallman, 380 U.S. 1 (1964) 45

United States v. Bass, 404 U.S. 336 (1971). 22

United States v. Carlo Bianchi & Co., Inc., 373 U.S. 709 (1963) 60

United States v. Cook, 384 U.S. 257 (1966) 25

United States v. Ryder, 110 U.S. 729 (1884). 24

University of California Regents v. Bakke, 47 U.S.L.W. 4896 (June 28, 1978) 12

Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974) 6

Vermont Yankee Nuclear Power Corp. v. NRDC, Inc. 46 U.S.L.W. 4301 (April 3, 1978) 67

Westinghouse Electric Corp. v. Brown, 443 F. Supp 1225 (E.D. Va. 1977). 54

Westinghouse Electric Corp. v. Schlesinger, 542 F.2d 1190 (4th Cir. 1976), cert. denied sub nom. Brown v. Westinghouse Electric Corp., 431 U.S. 924 1977) . . 12, 39, 48, 51, 54, 57, 59, 65

Yates v. United States, 354 U.S. 298 (1957) 22

STATUTES, EXECUTIVE ORDERS AND REGULATIONS:

Administrative Procedure Act, Ch. 324, 60 Stat. 238 (formerly codified at 5 U.S.C. § 1002 (1946) 5, 69, 70
5 U.S.C. § 701 et seq. (1976) 66
§ 706(2)(A)(1976). 9
. . . . . 16, 19, 39, 59, 61, 62

Declaratory Judgment Act, 28 U.S.C. § 2201 (1970). 61

Executive Order 11246, 30 Fed. Reg. 12319 (1965), as amended by Executive Order 11375, 32 Fed. Reg. 14303 (1967), 3 C.F.R. 169-177 (1974 compilation). . . . 10, 11, 40, 44, 47

Freedom of Information Act, Pub. L. No. 89-554, 80 Stat. 383 (1966), codified at 5 U.S.C. § 552 69
5 U.S.C. § 552(a)(4)(B)(1976) . . 68, 69
§ 552(b)(1976) 68
§ 552(b)(3)(1976). . . . 48-59
§ 552(b)(4)(1976). 50, 51, 53

Government in the Sunshine Act, Pub. L. No. 94-409, § 3(a), 90 Stat. 1241 (1976), codified at 5 U.S.C. § 552b 15, 51

5 U.S.C. § 301 (1966) . . 40, 42, 43, 44

15 U.S.C. § 176a (1940) 22, 23

15 U.S.C. § 176b (1940) 22, 23

18 U.S.C. § 216 (1940). . . . 22, 23, 24

18 U.S.C. § 1905 (1970) . . . . . passim

19 U.S.C. § 1335 (1940) 22, 23

28 U.S.C. § 1331 (1976) 61

Tariff Act of 1894, Ch. 349 § 34, 28 Stat. 509 34

Reconstruction Finance Corporation Act of 1932, 47 Stat. 5 (1932). 37

Act of June 25, 1948, Ch. 645, § 1905, 62 Stat. 683. 21

Revised Statutes of the United States § 161 (1st Ed. 1873-1874) 41

41 CFR Part 60-1.1. 10
60-1.7(a) 10
60-1.24 11
60-1.24(d). 11
60-1.40 10
60-2.1. 10
60-40 . . . . . 33, 63
60-40.1 et seq. 40, 47
60-60.4(d). 66
60-60.9 11

38 Fed. Reg. 3192 (February 2, 1976). 16

LEGISLATIVE MATERIALS:

7 Cong. Rec. 4005-06 (1878) 36

26 Cong. Rec. 6893 (1894) 35

94 Cong. Rec. 872 (1948). 27

104 Cong. Rec. 6550 (1958). 43

122 Cong. Rec. H 7867 (daily ed. July 28, 1976). 15

122 Cong. Rec. H 9260 (daily ed. August 31, 1976). 55

H. R. Rep. No. 304, 80th Cong., 1st Sess. (1947). 22, 27

H. R. Rep. No. 1461, 85th Cong., 2d Sess. (1958) 42

H. R. Rep. No. 1497, 89th Cong., 2d Sess., reprinted in [1966] U.S. Code Cong. & Ad. News 2418 . . . . . 5, 54, 68, 70

H. R. Rep. No. 92-1419, 92d Cong., 2d Sess. (1972) 68

H. R. Rep. No. 94-880, 94th Cong., 2d Sess., Part I (1976) (Comm. on Gov't. Operations) . .52, 57

H. R. Rep. No. 94-1441, 94th Cong., 2d Sess. (1976) . . 15, 52, 53

S. Rep. No. 1620, 80th Cong., 2d Sess. (1948). 26

S. Rep. No. 1621, 85th Cong., 2d Sess. (1958). 42

S. Rep. No. 813, 89th Cong., 1st Sess. (1965) 5, 68, 70, 71

S. Rep. No. 1380, 89th Cong., 2d Sess. (1966). 32

S. Rep. No. 93-854, 93d Cong., 2d Sess. (1974). 68

Business Record Exemption of the Freedom of Information

Act: Hearings Before the Subcomm. on Gov't Information and Individual Rights of the House Comm. on Gov't Operations, 95th Cong., 1st Sess. (1977). . . . 17

Freedom of Information Act Hearings Before the Subcomm. on Admin. Practice and Procedure of the Senate Comm. on the Judiciary, 95th Cong., 1st Sess. (1977). 17

Hearings on Revision of Title 18 and 28 of the United States Code before Subcommittee No. 1 of the House Committee on the Judiciary, 80th Cong., 1st Sess. (1947). 30

MISCELLANEOUS GOVERNMENT MATERIAL:

41 Op. Att'y Gen. 166 (1953) . . 37 ,38

41 Op. Att'y Gen. 221 (1955) 36

ARTICLES AND TREATISES:

Barron, The Judicial Code 1948 Revision, 8 F.R.D. 439 (1949) . . . 31

Clement, The Rights of Submitters to Prevent Agency Disclosure of Confidential Business Information: The Reverse Freedom of Information Act Lawsuit, 55 Tex. L. Rev. 587 (1977). . . 21 43, 51, 60, 63, 69

K. Davis, Administrative Law of the Seventies (1976) 51, 57

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1977

No. 77-922

CHRYSLER CORPORATION,

Petitioner,

v.

HAROLD BROWN, et al.,

Respondents.

BRIEF OF AMICI CURIAE CONSUMER FEDERATION OF AMERICA, WOMEN'S EQUITY ACTION LEAGUE, MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND AND WOMEN'S LEGAL DEFENSE FUND

INTEREST OF AMICI CURIAE

With the consent of both parties, amici curiae Consumer Federation of America, Women's Equity Action League, Mexican American Legal Defense and Educational Fund and Women's Legal Defense Fund file this brief. A brief description of amici and of the nature of their interest in this litigation may be relevant to the Court's consideration of the issues raised by the parties.

Consumer Federation of America ("CFA"), which appeared as amicus curiae below, is the largest consumer organization in the United States, composed of over 220 national, state and local consumer organizations, representing over 30 million American consumers. As such, CFA has a vital interest in maximizing citizen access to government-held information, including information which documents the extent of private business compliance with the Nation's many consumer protection statutes.

Women's Equity Action League ("WEAL") is a nation-wide membership organization designed to promote greater economic progress for American women and to press for full enforcement of laws prohibiting sex discrimination. Women have traditionally been subjected to employment discrimination and are only now beginning to gain access to equal employment opportunity. Hence, the elimination of sex discrimination in employment is a matter of primary emphasis for WEAL.

The Mexican American Legal Defense and Educational Fund ("MALDEF") is the only national organization in the country dedicated exclusively to the legal representation of the interests of Mexican Americans. Its constituency of six million persons of Mexican American descent is a group which has historically been victimized by racial discrimination in employment. Consequently, strict enforcement of equal employment opportunity requirements is particularly important to MALDEF.

Women's Legal Defense Fund ("WLDF") was organized with the express purpose of securing equal rights for women through the legal and legislative processes. One of WLDF's primary purposes is to oversee and evaluate private compliance with, and government enforcement of, the various federal equal employment programs.

As with CFA and the enforcement of the nation's consumer laws, WEAL, MALDEF and WLDF consider access to relevant information bearing upon the performance of federal contractors under Executive Order 11246 to be essential to their efforts to assess and monitor the effectiveness of governmental enforcement activity.

ISSUES DISCUSSED BY AMICI

1. Whether the equal employment information submitted to the government by contractors constitutes the type of information which Congress intended to encompass within 18 U.S.C. § 1905 and, assuming arguendo that this information is covered by § 1905, whether the Government is nevertheless "authorized," within the meaning of § 1905, to disclose this information.

2. Whether 18 U.S.C. § 1905 falls within exemption 3 of the Freedom of Information Act and thus excludes from the Act's mandatory disclosure requirements information which otherwise would be required to be released.

3. Whether a district court has authority to conduct a de novo review of an agency's determination to disclose information pursuant to a Freedom of Information Act request, or instead must review the agency's determination under the Administrative Procedure Act's "arbitrary and capricious" standard, on the basis of the agency's record.

CONTEXT AND SIGNIFICANCE OF ISSUES POSED

This case is representative of a new and flourishing type of litigation arising in connection with the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, the "reverse FOIA" suit in which private parties seek to prevent the government from releasing information to those who have requested it under the FOIA. Much of the information sought to be barred from public scrutiny is, as in this instance, collected by the government in an effort to enforce Congressional or Executive mandated regulatory programs. This Court's resolution of the issues presented in this case, therefore, will have a far reaching impact not only on the development and implementation of FOIA law but also upon the operations of those government regulatory programs which, depending on this Court's decision, may or may not be shielded from public view.

Before turning to the specific arguments amici intend to advance, it is appropriate to explore briefly the philosophy and framework of

the FOIA and to set forth what we believe to be the proper approach to be followed in resolving reverse FOIA issues. A discussion of the importance of public access to the type of information so often the subject of reverse FOIA litigation, and of the various protections against arbitrary government release afforded submitters, is also necessary in order to put in proper perspective Chrysler's portrayal of the decision below as bringing to an end the sanctity of confidential business information and ushering in an era of chaos and competitive harm for business submitters. 1/

1. Philosophy and framework of the FOIA. The FOIA was intended to implement a general philosophy of the "fullest responsible disclosure" of information in government files. 2/ Faced with a history of pervasive and indiscriminate government withholding of requested information, 3/ Congress amended the original public information section of the Administrative Procedure Act 4/ to ensure that it could no longer

1/ See, e.g., Brief of Petitioner Chrysler Corporation ("Chrysler's Brief") at 19-25.

2/ S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965).

3/ Id. at 4; H.R. Rep. No. 1497, 89th Cong., 2d Sess. 4-5, reprinted in [1966] U.S. Code Cong. & Ad. News 2418, 2421-22.

4/ Ch. 324, § 3, 60 Stat. 238 (1946).

be used as a means of perpetuating government secrecy. This Court has rightly characterized Congress' action as a sweeping revision "whose basic purpose reflects a 'general philosophy of full agency disclosure.'" Department of Air Force v. Rose, 425 U.S. 352, 360 (1976), quoting S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965). 5/

While the FOIA clearly indicates Congress' commitment to the concept that maximum disclosure of government-held information will best serve the public interest, Congress at the same time recognized that in certain instances there are countervailing interests to this paramount policy of disclosure. To accommodate these other interests, Congress exempted from the mandatory disclosure provisions of the FOIA nine categories of information, including confidential business information. 6/ As this Court has stated, these exemptions are to be narrowly construed. 7/ When requested information

5/ See also EPA v. Mink, 410 U.S. 73, 80 (1973). ("Without question, the Act is broadly conceived. It seeks to permit access to official information long shielded unnecessarily from public view . . . .")

6/ 5 U.S.C. § 552(b)(4).

7/ Department of Air Force v. Rose, 425 U.S. at 361, citing Vaughn v. Rosen, 484 F.2d 820, 823 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974).

does fall within one of these nine narrow exemptions, the irrebutable presumption of openness yields to the countervailing interest expressed by the exemption. Then, the agency has the "option to keep [the information] confidential, if it so chooses." 8/ However, in exercising this option, discretion nevertheless to disclose exempt material is not unfettered; it may be restricted by statute or agency regulations, and in any event must be consistent with the bounds of agency discretion long recognized in our legal system. See discussion, infra, p. 16.

2. Analytic approach to reverse FOIA issues. As the numerous rather conflicting reverse FOIA decisions indicate, there is a need for guidance from this Court on a series of specific legal issues posed by an agency's decision to release to a requester material which it believes may be exempt from the mandatory disclosure provisions of the FOIA. There is also a need for guidance as to the analytical sequence which must be followed by an agency, and reviewed by a court, in the course of

8/ EPA v. Mink, 410 U.S. at 80; see also Department of Air Force v. Rose, 425 U.S. at 361.

Chrysler's extended treatment notwithstanding, Chrysler's Brief at 12-28, the FOIA itself does not provide a bar to disclosure of exempt information. See n.88 at p. 59, infra.

that disclosure decision. Amici submit that the following sequence is apparent from a consideration of the FOIA's terms.

First, the threshold question is whether the FOIA mandates disclosure. If none of the Act's nine exemptions apply, the agency, of course, must disclose the requested information. Second, if the FOIA does not require disclosure, i.e., if the information is covered by an exemption, the agency must still consider whether disclosure would serve the public interest. In doing so, the agency must first assure itself that disclosure is not barred by some other statute or applicable regulation. If no such statute or regulation exists, the agency must then properly consider all competing interests and strike the necessary balance envisioned by the FOIA between the policy of disclosure and any countervailing interest.

The court of appeals in Chrysler essentially endorsed this analytical approach to reverse FOIA issues. 9/ Moreover, in describing the judicial role in this process, the appellate court was careful to counsel against de novo review of the agency's various decisions, holding that review must be conducted under the "arbitrary and capricious" standard of the Admin-

9/ Chrysler Corp. v. Schlesinger, 565 F.2d 1172, 1192 (3rd Cir. 1977).

istrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A). 10/

3. The public and private interests affected by disclosure. Chrysler attacks this view of the FOIA, characterizing it as stripping submitters of business information of the cloak of immunity from agency disclosure provided by that statute, and virtually leaving business submitters -- if not the nation's economy -- on the brink of disaster. Aside from narrower, erroneous legal arguments, Chrysler's position suffers from two major flaws. First, it misconceives the purpose of the FOIA, as it applies to the type of information in question here, and second, it seeks to obscure what is at issue in this particular case, as well as the substantial protections provided by the decision below.

At the core of Chrysler's contention that business information should be absolutely immune from disclosure is the theory that because the FOIA was enacted to increase the public's awareness of the workings of its government, it was not intended to provide access to merely private information. This distinction between private and government information, however, is largely superficial. As government takes on increasing responsibility for protecting members of the public against abuses experienced in the private sector, the public's "right to know" becomes commensurate with

10/ Id. at 1192-93.

its access to the submitter-generated information to which agency action or inaction relates. This case poses a perfect example. The Secretary of Labor is charged with enforcing Executive Order 11246 (as amended), 11/ which prohibits employment discrimination by companies with government contracts. It also requires contractors to take affirmative action to insure that applicants are hired, and that employees are treated during employment without regard to race, color, religion, sex or national origin. In order to monitor compliance with these requirements, regulations issued by the Secretary of Labor 12/ require all non-exempt government contractors to prepare and file EEO-1 reports containing data on the number of women and minorities employed, 13/ and Affirmative Action Programs ("AAPs"), 14/ providing information on past and projected employment of women and minorities. This information in part forms the basis for determining whether an individual contractor is in violation of the Executive Order. It may in turn be supplemented by investigatory material, obtained pursuant to regular compliance

11/ Executive Order 11246, 30 Fed. Reg. 12319 (1965), as amended by Executive Order 11375, 32 Fed. Reg. 14303 (1967), 3 C.F.R. 169-177 (1974 compilation).

12/ 41 C.F.R. §§ 60-1.1 et seq.

13/ 41 C.F.R. § 60-1.7(a).

14/ 41 C.F.R. §§ 60-1.40, 60-2.1.

reviews or special investigations by the Office of Federal Contract Compliance ("OFCC") within the Department of Labor, or by the individual agencies. 15/ When a determination of violation is made, after an opportunity for a formal hearing, the Order authorizes various sanctions, including contract suspension, cancellation, termination, and debarment from future contracts. 15a/ If the public is barred from access to the underlying data on which the decision to impose or not to impose these sanctions is based, it has no way of evaluating whether the Department of Labor is fulfilling its responsibilities under the Executive Order. Hence, contrary to Chrysler's implication that in this type of situation the only interest worthy of protection is the submitter's interest in confidentiality, this interest must be carefully balanced against both the paramount interest underlying the FOIA of opening the government to public scrutiny and the interest reflected in Executive Order 11246 in ensuring equal employment opportunity by government contractors.

The proper classification of submitter data as "public" or "private" information aside, amici also take issue with the parade of horrors conjured up by Chrysler as flowing from the court of appeals' decision. Chrysler paints its picture with broad strokes, talking about agency practices in general, 16/ confidential

15/ 41 C.F.R. §§60-60.9, 60-1.24(d).

15a/ 41 C.F.R. § 60-1.24.

16/ See, e.g., Chrysler's Brief at 78.

business information as if it were an undifferentiated mass, and the material which OFCCP sought to release here as if it were of the most sensitive nature. Surely there are types of business information coming into the hands of government agencies which, within the bounds of applicable legal standards, could not -- and should not -- be released. But this is not the case here. The two courts below, and the agency before them, were not presented with a request to release a guarded trade secret or new marketing or design strategies. Rather, the information at issue bears upon Chrysler's employment practices and its compliance with the established public policy of affirmative action to ensure equal employment opportunity. 17/ Moreover, despite what Chrysler might wish the Court to believe about the nature of the documents requested, it appears that only a small portion of those documents contained data which might conceivably be of interest to a competitor. 18/

17/ Cf. University of California Regents v. Bakke, 47 U.S.L.W. 4896 (June 28, 1978).

18/ After a full, and we submit improper, trial de novo the district court in large measure confirmed the preceding agency decision, finding that all but a very small portion of the information sought would cause Chrysler no substantial competitive harm if disclosed. Chrysler Corp. v. Schlesinger, No. 75-159 (D. Del., June 17, 1976), (footnote continued on page 13)

Chrysler's spectre of substantial competitive harm is further undermined by the fact that, despite Chrysler's repeated references to competitors as the primary seekers of business information under the FOIA, the requesters here were not business firms; 19/ nor have business firms been a significant source of reverse FOIA litigation. 20/

(footnote continued from page 12) reprinted with Chrysler's Petition for a Writ of Certiorari as App. B, at 49a.

19/ It is amici's understanding that the requesters were private citizens, concerned about Chrysler's efforts to meet its obligation to provide equal employment opportunity.

20/ In virtually all of these cases the requesters have been ordinary citizens or citizen groups working on behalf of consumers or minorities and women. See, e.g., Sears, Roebuck & Co. v. GSA, 553 F.2d 1378, 1380 (D.C. Cir. 1977)(Council on Economic Priorities); Westinghouse Electric Corp. v. Schlesinger, 542 F.2d 1190, 1194 (4th Cir. 1976), cert. denied sub nom. Brown v. Westinghouse Electric Corp., 431 U.S. 924 (1977)(Concerned Workers, Council on Economic Priorities); Charles River Park "A", Inc. v. HUD, 519 F.2d 935, 939 (D.C. Cir. 1975) (Boston's Commissioner of Assessment); General Dynamics Corp. v. Dunlop, 427 F. Supp. 578, 580 (E.D. Mo. 1976), vacated sub nom. General Dynamics (footnote continued on page 14)

4. Protections accorded submitters. Finally, rather than focus upon the shortcomings of other agencies' procedures, review of the actions of the agency and the two courts below should be set in the context of the actual procedures for asserting and protecting claims for confidentiality provided to Chrysler in this instance. The OFCC procedures applicable here are discussed in some detail at pp. 63-68, infra. In addition to these procedures, and contrary to the bleak picture painted by Chrysler, the interpretation of the FOIA and 18 U.S.C. § 1905 adopted by the court of appeals also provides submitters with substantial protection against arbitrary agency disclosure of confidential business information.

(footnote continued from page 13) Corp. v. Marshall, 572 F.2d 1211 (8th Cir. 1978)(Connecticut Women's Education and Legal Fund, Inc. and Treasurer of NAACP, San Diego Branch); Metropolitan Life Ins. Co. v. Usery, 426 F. Supp. 150, 154 (D.D.C. 1976), cert. before judgment denied sub nom. Prudential Ins. Co. v. National Org. for Women, 431 U.S. 924 (1977)(D.C. Chapter National Organization for Women); Crown Central Petroleum Corp. v. Kleppe, 424 F. Supp. 744, 746 (D. Md. 1976)(Mexican American Legal Defense and Educational Fund); GTE Sylvania, Inc. v. Consumer Product Safety Commission, 404 F. Supp. 352, 357 (D. Del. 1977) (Consumers Union of the United States); Hughes Aircraft Co. v. Schlesinger, 384 F. Supp. 292, 294 (C.D. Cal. 1974) (Los Angeles Chapter, National Organization for Women).

As set out above, an agency must first determine whether requested information is exempt under the FOIA. In the case of confidential business information, if the agency finds that disclosure of the requested information would cause "substantial competitive harm" 21/ to the submitter, the agency is precluded from disclosing unless it makes a determination that disclosure would, nevertheless, serve the public interest. If the information also falls within §1905, disclosure can only take place if it is "authorized by law." Moreover, that "authority," if not expressed in a statute, must be found in a validly enacted and openly arrived at agency regulation. Hence, in this case, it has been a clearly articulated policy of the

21/ National Parks & Conservation Ass'n v. Morton, 498 F.2d 765, 767, 770 (D.C. Cir. 1974). Despite the fact that Chrysler did not seek the Court's review of the National Parks test, it argues now that the Court should overrule the great body of judicial opinion supporting that decision. Chrysler Brief at 20-21 n. 19. The other shortcomings of this tack aside, it overlooks Congress' endorsement of the National Parks' reading of exemption 4, when Congress adopted the identical exemption as part of the Government in the Sunshine Act, Pub. L. No. 94-409 (1976). See H.R. Rep. No. 94-1441, 94th Cong., 2d Sess. 15 (1976) (Conf. Rep. on the Govt. in the Sunshine Act). See also 122 Cong. Rec. H7867 (daily ed. July 28, 1976).

Secretary of Labor to release the type of information here at issue since 1973, 22/ thus giving Chrysler a more than adequate opportunity to question the Secretary's policy and to otherwise protect its interests. As a final check against arbitrary agency action, any agency decision to disclose submitter-generated information, whether pursuant to the FOIA or an agency disclosure regulation, is subject to "abuse of discretion" judicial review under the APA, 5 U.S.C. § 706(2)(A). This standard of review -- applied generally with respect to all sorts of governmental action -- serves to assure submitters of business information that the agency applied the proper legal standards and considered all competing interests before making a decision to disclose. This is, we submit, all the protection that the FOIA or § 1905 requires, or that business firms legitimately need.

One final note of caution is appropriate. Time will tell whether submitters of confidential business information need additional protection from disclosure not presently provided for in the FOIA and § 1905. If, in attempting to rectify a past pattern of over-withholding by government agencies, a new pattern of over-disclosing emerges, Congress presumably will act to correct it. 23/ Although amici do not believe

22/ 38 Fed. Reg. 3192 (February 2, 1973).

23/ Indeed, Congressional committees are well aware of the general allegations (footnote continued on page 17)

this to be the case and submit that the present scheme gives due concern to all competing interests, Chrysler's cry for help in this forum would in any case be misplaced. As recently stated by the Court

> . . . in our constitutional system the commitment to the separation of powers is too fundamental for [this Court] to pre-empt congressional action by judicially decreeing what accords with "common-sense and the public weal." Our Constitution vests such responsibilities in the political Branches. Tennessee Valley Authority v. Hill, 46 U.S.L.W. 4673, 4684 (June 15, 1978).

SUMMARY OF THE ARGUMENT

This brief focuses in large part on the meaning and scope of 18 U.S.C. § 1905, and the relationship between that

(footnote continued from page 16)
of submitters, having held extensive hearings on the subject. See, e.g., Business Record Exemption of the Freedom of Information Act, Hearings Before the Subcomm. on Gov't Information and Individual Rights of the House Comm. on Gov't Operations, 95th Cong., 1st Sess. (1977); Freedom of Information Act Hearings Before the Subcomm. on Admin. Practice and Procedure of the Senate Comm. on the Judiciary, 95th Cong., 1st Sess. (1977).

statute and the FOIA. Amici also address the issue of the proper scope of judicial review in reverse FOIA cases.

An issue explicitly left open by the court of appeals, 24/ but one that is fundamental to any analysis of § 1905, is the intended scope of that statute. While the language of § 1905 might on its face be construed to include equal employment information, the legislative history of § 1905 conclusively demonstrates that Congress did not intend that section to apply to this type of information. Rather, the broad language of § 1905 stems from an unintended change in statutory language which occurred when Congress reenacted § 1905 as a consolidation of three prior non-disclosure statutes. This Court's decisions, and established principles of statutory construction which Congress has indicated should be applied to changes produced by statutory consolidation, mandate a narrow interpretation of § 1905 which preserves the intent of its predecessor statutes.

However, even if the Court were to find that this information falls within § 1905, that section does not bar the disclosure at issue in this case. Section 1905, by its terms, bars only those disclosures which are "not authorized by law." Amici demonstrate that validly adopted agency regulations

24/ Chrysler Corp., 565 F.2d at 1187 n. 73.

provide the "authority" required by § 1905 and that the regulations which authorized disclosure in this case were, as the court of appeals held, within the legal authority of the Secretary of Labor.

In hopes of obtaining protection from mandatory disclosure of commercial information broader than that provided by exemption 4 to the FOIA, as interpreted in the National Parks case, 25/ Chrysler argues that § 1905 is a specific "withholding" statute within the meaning of exemption 3 to the FOIA. An analysis of the interrelationship between § 1905 and the FOIA, however, mandates the conclusion that § 1905 can only be called into play when information is first found to fall within exemption 4. Any other reading would subsume and render meaningless the specifically provided protection for confidential business information contained in exemption 4. Moreover, § 1905's general prohibition against unauthorized disclosure of confidential business information does not satisfy the specific criteria set forth in exemption 3.

Finally, amici submit that the court of appeals correctly held that, absent a determination that agency fact-finding procedures were inadequate, the scope of judicial review in reverse FOIA cases is limited by the APA, 5 U.S.C. § 706(2)(A), to a determination on the basis of the agency record whether

25/ 498 F.2d 765, discussed supra p. 15 n. 21.

the agency's decision to disclose was "arbitrary and capricious, an abuse of agency discretion, or otherwise not in accordance with law." This conclusion is compelled by the reasoning underlying this Court's prior decisions on the proper scope of review under the APA, and is consistent with the policies clearly reflected in the FOIA.

ARGUMENT

I. 18 U.S.C. § 1905 DOES NOT APPLY TO THE TYPE OF INFORMATION IN DISPUTE HERE AND, IN ANY EVENT, DISCLOSURE IS "AUTHORIZED BY LAW" WITHIN THE MEANING OF § 1905.

18 U.S.C. § 1905 is a criminal statute which provides penal sanctions for the disclosure by government employees of certain types of information where such disclosure is "not authorized by law." 26/ In order to determine whether § 1905 prohibits disclosure of the equal employment opportunity information which the government sought to release in this case, this Court must first determine whether § 1905 was intended to encompass this type of information. Should the Court conclude that the information falls within § 1905's coverage, the Court must then determine whether the OFCC disclosure regulations would "authorize" the proposed disclosure, thereby rendering § 1905's prohibitions inapplicable.

26/ For the full text of 18 U.S.C. § 1905, see Appendix A at A-1, infra.

A. The Legislative History Of 18 U.S.C. § 1905 Clearly Demonstrates That The Equal Employment Information Here Does Not Fall Within The Scope Of That Section

It is at least arguable that certain of the equal employment opportunity data which are the subject of this litigation fall within the literal reach of § 1905. An analysis of § 1905's legislative history, however, clearly demonstrates that Congress never intended such a result. Rather, § 1905 was originally enacted in 1948 as a consolidation of three prior nondisclosure statutes contained in the Criminal Code, 27/ none of which would have covered the type of information at issue here. As this Court has held on numerous occasions in the past, absent clear Congressional intent to the contrary, the reach of a consolidated statute should be interpreted to extend no further than that of its predecessor statutes. This conclusion is reinforced

27/ See Act of June 25, 1948 ch. 645, § 1905, 62 Stat. 683, 791, codified at 18 U.S.C. § 1905.

For a thorough examination of the legislative history of § 1905, see generally Clement, The Rights of Submitters to Prevent Agency Disclosure of Confidential Business Information: The Reverse Freedom of Information Act Lawsuit, 55 Tex. L. Rev. 587, 606-613 (1977).

by another cardinal principle of statutory construction: Section 1905 is a criminal statute, and accordingly should be narrowly construed. 28/

Section 1905 represents a consolidation of three narrowly drafted and specific nondisclosure statutes that appeared in the 1940 edition of the United States Code: 29/ an income tax nondisclosure statute, 30/ a Tariff Commission nondisclosure statute 31/ and a Commerce Department nondisclosure statute 32/ (hereinafter collectively referred to as the "1940 nondisclosure statutes.")33/ The 1940 income tax nondisclosure statute prohibited the disclosure of the "amount or source of income, profits, losses, expenditures, or any particular thereof, set forth

28/ Huddleston v. United States, 415 U.S. 814, 831 (1974); Rewis v. United States, 401 U.S. 808, 812 (1970); United States v. Bass, 404 U.S. 336, 347 (1971); Yates v. United States, 354 U.S. 298, 304, 305, 310 (1957).

29/ See H.R. Rep. No. 304, 80th Cong., 1st Sess. A 127-A 128 (1947).

30/ 18 U.S.C. § 216 (1940).

31/ 19 U.S.C. § 1335 (1940).

32/ 15 U.S.C. § 176a and § 176b (1940).

33/ This terminology is adopted only to simplify the discussion, and should not obscure the fact that all three statutes were enacted prior to 1940.

or disclosed in any income return. . ." (Emphasis added.) 34/ Prior to 1948, the 1940 Tariff Commission nondisclosure statute 35/ prohibited the disclosure of trade secrets or processes embraced in any examination or investigation conducted by the Tariff Commission. Finally, the Commerce Department nondisclosure statute 36/ prohibited only the disclosure of statistical information furnished in confidence to the Bureau

34/ The full text of 18 U.S.C. § 216 (1940) is set forth in Appendix A at A-1, A-2, infra. It is clear from the face of the 1940 statute that § 216 applied only to tax-related information gathered by tax officials. Throughout the statute is the limitation that it applies only to information from an "income return." However, in the first phrase, which relates to "operations, style of work or apparatus of any manufacturer or producer," the prohibition is not expressly limited to tax officials. This omission apparently resulted from the inadvertent change in the language of § 216 in a 1926 codification which eliminated the reference to revenue officers and agents. See the full legislative history of § 216 set forth in Appendix B, infra.

35/ The full text of 19 U.S.C. § 1335 (1940) is set forth in Appendix A at A-2, A-3, infra.

36/ The full text of 15 U.S.C. §§ 176a and 176b (1940) is set forth in Appendix A at A-3, A-4, infra.

of Foreign and Domestic Commerce. Hence, the three statutes were narrowly focused on specific types of data collected in particular ways by three discrete agencies of the federal government. As such, there can be no doubt that § 1905's predecessor statutes would not have applied to the employment information submitted by Chrysler to DSA, wholly unrelated to the taxing function, or the specialized activities of these three agencies.

Despite the clearly limited scope of § 1905's predecessor statutes, Chrysler urges a literal interpretation of § 1905 that would extend the coverage of the consolidated statutes beyond recognition, to cover what the court of appeals termed "virtually every category of business information likely to be in the files of any federal agency." 37/ To permit such an expansion of prior law, without a clear indication of Congressional intent to do so, directly contradicts this Court's consistent holding that: "[i]t will not be inferred that the legislature, in revising and consolidating the laws, intended to change their policy, unless such an intention be clearly expressed." United States v. Ryder, 110 U.S. 729, 740 (1884).

The general rule of statutory construction announced in Ryder has been specifically applied by this Court on several occasions in interpreting provisions of the 1948 codifications of

37/ Chrysler Corp., 565 F.2d at 1186.

both Title 18, the Criminal Code of which § 1905 is a part, and Title 28, the Judicial Code. 38/ In fact, this Court has repeatedly stated that it is now a "well-established principle governing the interpretation of provisions altered in the 1948 revision . . . that 'no change is to be presumed unless clearly expressed.'" 39/

The most thorough examination of the legislative history of the 1948 codification of the Criminal Code is provided in Muniz v. Hoffman, 422 U.S. 454 (1975). In that case, this Court held that, in recodifying § 11 of the Norris-

38/ See Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975); Muniz v. Hoffman, 422 U.S. 454 (1975); Tidewater Oil Co. v. United States, 409 U.S. 151 (1972); United States v. Cook, 384 U.S. 257 (1966); City of Greenwood v. Peacock, 384 U.S. 808 (1966); Fourco Glass Co. v. Transmirra Corp., 353 U.S. 222 (1957). Cases involving revisions of the Judicial Code are relevant to the present case because of the parallel course followed in the revisions of the Criminal and Judicial Codes. See Muniz, 422 U.S. at 470, n. 10.

39/ Muniz, 422 U.S. at 474. See also Tidewater Oil Co., 409 U.S. at 162; Fourco Glass Co., 353 U.S. at 228. This general rule has also been applied to changes resulting from other codifications. See, e.g., Cass v. United States, 417 U.S. 72, 82 (1974).

LaGuardia Act 40/ as § 3692 of the Criminal Code (Title 18 of U.S.C.) Congress did not intend to extend the right to a jury trial to individuals accused of contempt under the Labor Management Relations Act, 41/ although § 3692 unambiguously granted such a right. Thus, this Court narrowed the reach of the 1948 codification, consistent with the scope of its predecessor statute. Relying on the House and Senate Reports to support the conclusion that Congress intended to preserve the original legislative intent underlying the statutes that were rearranged and codified into Title 18, Justice White stated:

> The revision of the Criminal Code was, . . . a massive undertaking, but, as the Senate Report on that legislation made clear "[t]he original intent of Congress is preserved." S. Rep. No. 1620, 80th Cong., 2d Sess. 1 (1948). Nor is it arguable that there was any intent in the House to work a change in the understood applicability of § 11 in enacting § 3692. The House Report stated that "[r]evision, as distinguished from codification, meant the substitution of plain language for awkward terms, reconciliation

40/ 29 U.S.C. § 111 (1946).

41/ 29 U.S.C. § 141 et seq. (1965).

> of conflicting laws, omission of superseded sections, and consolidation of similar provisions." H.R. Rep. No. 304, 80th Cong., 1st Sess. 2 (1947). 42/

The Court's opinion also emphasized that all revisions in the law were carefully explained in a series of Reviser's Notes printed in the House Report. 43/ The Reviser's Notes -- the only part of the legislative history of the 1948 codification statute bearing directly upon § 1905 44/ -- indicate a clear intent only to consolidate the three prior nondisclosure statutes. Nothing in the Reviser's Notes suggests that Congress intended in the process of consolidation to expand the scope of these statutes. Thus, the Notes state only that "[m]inor changes were made in translations and phraseology." 45/ As the Court observed in

42/ 422 U.S. at 468, 469. Similar language appears in the brief discussion of the 1948 codification statute in the Senate. See 94 Cong. Rec. 872 (1948) (remarks of Senator Wiley).

43/ The House Report states that "[t]he reviser's notes . . . explain in detail every change made in text." H.R. Rep. No. 304, supra at 9.

44/ Id. at A 127-A 128.

45/ The concerns expressed by Justice Stewart in his dissent in Muniz are not

(footnote continued on page 28)

Muniz, in light of the express intent in both the House and Senate Reports not to effectuate any change in substance in revising the Criminal Code, it "would seem difficult at best to argue that a change in the substantive law could nevertheless be effected by a change in the language of a statute without any indication in the Reviser's Notes of that change." 46/

(footnote continued from page 27)
applicable here. In that case, Justice Stewart pointed out that the revisers did not say that § 3692 was intended to be a mere recodification of § 11 of the Norris-LaGuardia Act but rather that it was "based on" § 11. Justice Stewart contrasted this situation with that relating to the recodification of 18 U.S.C. § 403 dealing with contempts constituting crimes where, although also "based on" prior law, the revisers specifically noted that "'[i]n transferring these sections to this title and in consolidating them numerous changes of phraseology were necessary which do not, however, change their meaning.'" 422 U.S. at 484, 485. The revisers' comments on § 1905 are almost identical to their comments on § 403. In both, they indicate an unquestioned intent to consolidate and make changes in phraseology rather than substance.

46/ Muniz, 422 U.S. at 472.

Moreover, an interpretation of § 1905 in accordance with the intent of its predecessor statutes is supported by Congress' own perception of the role of the courts in dealing with changes produced by statutory consolidation generally, and Title 18 and 28 specifically. In the joint hearings held on the revisions of the Judicial and Criminal Codes, the Law Revision Counsel expressed Congress' assumption that the courts would rectify any unintentional changes created in the process of codification:

> There is one thing that I would like to point out . . . and that is the rule of statutory construction. In the work of revision, principally codification, as we have done here, keeping revision to a minimum, I believe the rule of statutory construction is that a mere change of wording will not affect a change in meaning unless a clear intent to change the meaning is evidenced.
>
> * * *
>
> It is clearly indicated in each of those revisers' notes [contained in the committee reports] whether any change was intended so that merely because we have changed the language -- we have changed the language to get a uniform style, to avoid

> awkward expression, to state a thing more concisely and succinctly -- but a mere change in language will not be interpreted as an intent to change the law unless there is some other clear evidence of an intent to change the law." Hearings on Revision of Title 18 and 28 of the United States Code before Subcommittee No. 1 of the House Committee on the Judiciary, 80th Cong., 1st Sess., 40 (1947) (emphasis added). 47/

Hence, "[t]he nature of the revision process itself requires the courts, including this Court, to give particular force to the many express disavowals in the House and Senate Reports of any intent to effect

47/ Quoted with approval in Muniz, 422 U.S. at 472, 473:

> [T]his statement is particularly persuasive in view of the fact that its maker, Mr. Zinn, had served as Counsel to the Committee on Revision of the Laws for the previous eight years; the House Report on the revision of the Criminal Code pointed out that Mr. Zinn had, for that Committee, exercised close and constant supervision over the work of the revisers preparing the revision. 422 U.S. at 473 n. 11.

substantive changes in the law." Muniz, 422 U.S. at 472-473 n. 11. 48/

In sum, the legislative history of § 1905 indicates an intent only to consolidate three prior nondisclosure statutes and not to substantively alter their scope. None of these statutes was even arguably intended to encompass the employment information involved in this case. Under the principles frequently enunciated by this Court, both with respect to consolidations and the interpretation of criminal statutes, § 1905 must be read to preserve the original intent behind the 1940 nondisclosure statutes.

48/ See also Barron, The Judicial Code 1948 Revision, 8 F.R.D. 439, 445-446 (1949). In that article Mr. William W. Barron, the Chief Reviser of the Code, expressed this same view: ". . . no changes of law or policy will be presumed from changes of language in revision unless an intent to make such changes is clearly expressed. Mere changes of phraseology indicate no intent to work a change of meaning but merely an effort to state in clear and simpler terms the original meaning of the statute revised." Cited in Fourco Glass Co., 353 U.S. at 227 n. 8.

In 1966 when it codified Title 5, Government Organization and Employees, of the United States Code, Congress similarly indicated an expectation that the courts would correct any inadvertent changes in substance made in the process of codification:

(footnote continued on page 32)

B. Disclosure Of The Requested Information Is "Authorized By Law" Within The Meaning Of Section 1905

Even if the information at issue here were to fall within the scope of § 1905, disclosure would nevertheless not be barred by that section. Section 1905 does not provide for absolute nondisclosure of information coming within its reach, but by its terms specifically prohibits only disclosures that are "not authorized by law." The question in this case is whether agency regulations can provide the "authority" required by § 1905, and if so, whether the regulations which authorized disclosure here are within the legal authority of the Secretary of Labor. Amici submit that the court of appeals was correct in holding that the OFCC disclosure regulations "authorize" the release of

(footnote continued from page 31)

> It is sometimes feared or assumed that mere changes in terminology and style will result in changes in substance . . . The Committee wishes to express that in a codification statute, however, the courts uphold the contrary presumption: the statue is intended to remain substantively unchanged. S. Rep. No. 1380, 89th Cong., 2d Sess. 20-21 (1966).

the requested information within the meaning of § 1905. 49/

1) Validly Adopted Agency Regulations Provide "Authorization By Law" For Disclosure Within The Meaning of Section 1905

There can be no doubt -- and Chrysler does not contend otherwise -- that agency regulations reasonably adapted to the administration of a congressional act and not inconsistent with any statute, have "the force and effect of law." 50/ Rather, Chrysler contends that only another statute can provide "authority" within the meaning of § 1905 and that to allow an agency by validly issued regulations to provide such authority is to render § 1905's

49/ Chrysler Corp., 565 F.2d at 1186-1188.

The applicable regulations are contained in 41 C.F.R. Part 60-40, and generally provide for disclosure of this type of information.

50/ Paul v. United States, 371 U.S. 245, 255 (1963); Public Utilities Commission of California v. United States, 355 U.S. 534, 542 (1958); Maryland Casualty Co. v. United States, 251 U.S. 342, 349 (1920); Rodway v. United States Dept. of Agriculture, 514 F.2d 809, 814 (D.C. Cir. 1975); Laughlin v. United States, 474 F.2d 444, 453 n. 12 (D.C. Cir. 1972), cert. denied, 412 U.S. 941 (1973);

(footnote continued on page 34)

prohibition a nullity. Chrysler's Brief at 41-43. Chrysler's position, however, overlooks the fact that § 1905 was apparently directed at a narrow evil -- unauthorized disclosures by individual governmental employees having access to confidential information -- not at properly and openly arrived at agency disclosure decisions. Thus, it was not intended to bar the Secretary of Labor from disclosing equal employment data in the manner which has given rise to this litigation.

Contrary to Chrysler's assertion, the legislative history of § 1905 provides no real support for the proposition that Congress meant to prevent properly arrived at agency disclosure decisions. While the legislative history of the "authorized by law" provisions of § 1905's predecessor statutes is scant, as the Seventh Circuit has recently observed, the debates accompanying the reenactment of the income tax nondisclosure statute 51/ in the Tariff Act of 1894, 52/ reveal that

(footnote continued from page 33) General Services Administration v. Benson, 415 F.2d 878, 880 (9th Cir. 1969); G.L. Christian & Associates v. United States, 320 F.2d 345, 350 (U.S. Ct. Cl. 1963).

51/ 18 U.S.C. § 216 (1940).

52/ Ch. 349, § 34, 28 Stat. 509.

> those who expressed concern about disclosure (rather than just the investigatory powers involved in the predecessor legislation) seemed to focus their concern not on regulated agency action, but rather on unwarranted and uncontrollable action by "poorly paid revenue agents." 26 Cong. Rec. 6893 (1894)(remarks of Senator Aldrich). 53/

Hence, what brief legislative history there is lends support to the proposition that § 1905 was intended to prevent individual government employees, for personal reasons or private gain, from taking it upon themselves secretly to disclose confidential information

53/ Sears, Roebuck & Co. v. Eckerd, No. 77-1417, slip op. at 8-9 (7th Cir. April 25, 1978). The only explicit reference to the nondisclosure provision was Senator Aldrich's statement that "another section [§ 63, containing the nondisclosure provision], forbids revenue agents to disclose business secrets, but that provision is valueless" 26 Cong. Rec. 6893 (1894). Chrysler relies on this remark to bolster its position. Chrysler's Brief at 42. This provision was intended to prohibit revenue agents from taking it upon themselves to reveal confidential information, however, and not to prevent agencies from promulgating disclosure regulations.

obtained through governmental processes. 54/

Moreover, contrary to Chrysler's assertion, interpretations of the "authorized by law" proviso of § 1905 in no sense "confirm that agency regulations do not constitute authorization by law within the meaning of § 1905." Chrysler's Brief at 45. First, the Opinion of the Attorney General relied on by Chrysler, 41 Op. Att'y General 221 (1955), explicitly leaves open the critical question whether § 1905 is applicable to "the official action of a department or agency

54/ Chrysler also argues that because § 3165 of the Revised Statutes of 1873 was specifically amended to add the language "or regulation authorized by law" to the existing "authorized by law" language, such specificity should also be required before regulations could be used to authorize disclosure under § 1905. Chrysler's Brief at 44-45. But an examination of the legislative debates, 7 Cong. Rec. 4005-06(1878), reveals that Congress added this language to § 3165 simply to make explicit the Commissioner of Internal Revenue's power to issue regulations authorizing revenue agents to give oaths, because a specific question was raised as to the Commissioner's authority to do so under prior law. A similar inquiry into agency authority is, of course, required here. But, as discussed below, the Secretary of Labor has ample authority
(footnote continued on page 37)

of the United States acting through its head." Id. at 223. 55/ More importantly, an earlier Attorney General's Opinion, 41 Op. Att'y Gen. 166 (1953), stands squarely for the proposition that agency disclosures are authorized within the meaning of § 1905 so long as the agency's authority to disclose can be reasonably implied from any applicable statute. In this opinion, the question was whether the Reconstruction Finance Corporation Act ("RFC Act"),56/ which was silent on the issue of disclosure, authorized the Secretary of the Treasury to disclose information allegedly falling within the scope of § 1905. The RFC Act conferred upon the Secretary of the Treasury broad authority, in the Attorney General's words, to "do all things necessary or appropriate to facilitate . . . orderly

(footnote continued from page 36)
to issue regulations authorizing disclosure of the requested documents.

55/ Moreover, the Attorney General quoted the agency disclosure regulations extensively without any mention that they might be in violation of § 1905. However, there was no need to rely on the regulations to authorize disclosure because the Attorney General expressed the view that the requisite authority resided in a separate statute. Thus, the Opinion hardly "confirms" Chrysler's position.

56/ 47 Stat. 5 (1932).

and efficient liquidation of the Corporation."41 Op. Att'y Gen. at 170. The Attorney General advised the Administrator that if, pursuant to this broad authority, he determined that disclosure would aid liquidation, the disclosure would be "authorized by law" and therefore not prohibited by § 1905. Amici submit that this decision strongly reinforces the notion that disclosures pursuant to validly issued agency regulations are not subject to § 1905. If the Administrator of RFC could disclose § 1905 information because he determined it would further the purposes of the RFC Act, then clearly an agency head can issue regulations providing for disclosure so long as the regulations are within his or her legal authority.

Finally, contrary to Chrysler's assertion that the Third Circuit stands alone in holding that validly adopted agency regulations provide "authority" within the meaning of § 1905, Chrysler's Brief at 46, every other Circuit which has considered this issue has reached the identical conclusion. 57/ Amici submit that these decisions are consistent with the legislative history

57/ See Sears, Roebuck & Co. v. Eckerd, slip op. at 6-9; General Dynamics Corp. v. Marshall, 572 F.2d at 1217; Charles River Park, 519 F.2d at 942-43. (Although the D.C. Circuit did not find the regulation in that case to "authorize" disclosure within the meaning of § 1905, by analyzing the (footnote continued on page 39)

of § 1905. Moreover, this approach does not render § 1905 meaningless or submitters of business information defenseless against irresponsible agency disclosure of sensitive business information. It simply assures that disclosure will take place on the basis of public regulations issued under open rulemaking procedures, pursuant to adequate statutory authorization. Resulting regulations, as well as any particular decision to disclose requested information, may be challenged by submitters as an abuse of discretion under the APA, 5 U.S.C. § 706(2)(A). At the same time, non-reviewable, extra-legal release of data, whether based on personal gain or an individual employee's sense of what is in the public interest, is rendered illegal. This reading of § 1905 hardly contravenes public policy by allowing government officials who violate 18 U.S.C. § 1905 to "exculpate themselves merely by promulgating . . . regulations in justification of their conduct." Chrysler's Brief at 43, 44. Rather, this approach, with its notoriety and ample opportunity for public criticism and, where necessary, legal attack, is all that § 1905 requires.

(footnote continued from page 38) possible grants of authority for the regulation the Court appears to have acknowledged that validly issued regulations supply "authority" within the meaning of § 1905.) The Fourth Circuit in Westinghouse Electric Corp. v. Schlesinger, 542 F.2d at 1190, did not reach this issue.

2) 5 U.S.C. § 301 And Executive Order 11246 Each Provide Statutory Authority For The OFCC Disclosure Regulations

Since validly adopted agency regulations provide the "authority" required by § 1905, and since the information requested in this case is clearly encompassed by the OFCC disclosure regulations, 58/ the sole question remaining is whether these regulations are within the legal authority of the Secretary of Labor. Both 5 U.S.C. § 301, "the housekeeping statute," and Executive Order 11246, as amended, are ample sources of authority for the Secretary's action. 59/

a. 5 U.S.C. § 301. The court below correctly held that § 301 provides authority for the OFCC disclosure regulations. 60/ Section 301 provides in pertinent part:

> The head of an Executive department or military department may prescribe

58/ 41 C.F.R. §§ 60-40.1 et seq.

59/ In light of the authority arising from § 301 and the Executive Order, amici see no need to discuss the possibility that the FOIA itself provides authority for disclosure regulations.

60/ Chrysler Corp., 565 F.2d at 1186-1188.

> regulations for . . . the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public.

A predecessor of the housekeeping statute, section 161 of the Revised Statutes, 61/ was upheld as constitutional by this Court in Boske v. Comingore, 177 U.S. 459 (1900). In that case, the Court enunciated the following standard for judging the validity of administrative regulations promulgated under this statute:

> [A] regulation adopted under section 161 of the Revised Statutes should not be disregarded or annulled unless, in the judgment of the court, it is plainly and palpably inconsistent with law. Those who insist that such a regulation is invalid must make its invalidity so manifest that the court has no choice except to hold that the Secretary has exceeded his authority and employed means that are not at all appropriate to the end specified in the act of Congress. Id. at 470.

61/ R.S. § 161 (1st ed. 1873-1874).

The regulations at issue here, designed to govern the custody and use of data collected in the enforcement of the Executive Order, appear clearly to fall within this broad rulemaking authority. The court of appeals so held, as have the two other most recent appellate decisions in reverse FOIA cases. 62/ Chrysler contends, however, that the last sentence of § 301, added through a 1958 amendment, indicates a congressional intent to preclude agencies from promulgating disclosure regulations which would authorize disclosure of information falling within § 1905. For support, Chrysler relies principally on the D.C. Circuit's opinion in Charles River Park, 519 F.2d at 942-43. We submit that this narrow reading of § 301 is without merit.

While the clear aim of the 1958 amendment was to prevent agencies from relying on § 301 to wrongfully withhold information, 63/ there were

62/ See Sears, Roebuck & Co. v. Eckerd, slip op. at 6, and General Dynamics Corp. v. Marshall, 572 F.2d at 1217 n. 6.

63/ As was the case with the original public information section of the APA, discussed infra p. 5, the housekeeping statute was used by agencies as colorable authority for the withholding of information. S. Rep. No. 1621, 85th Cong., 2d Sess. 3-4 (1958); H.R. Rep. No. 1461, 85th Cong., 2d (footnote continued on page 43)

fears expressed by several congressmen that the amendment would be misinterpreted to compel disclosure of information authorized to be withheld by other nondisclosure statutes. Accordingly, Congressman Moss, the sponsor of the amendment, explained that the amendment would not affect any statute other than the housekeeping statute, stating that "[the amendment] does not go to any other statutory authority which confers upon the . . . agencies . . . the right to withhold information . . . It does not affect the confidential status of information within the scope of § 1905." 64/ As the court of appeals observed, Chrysler's interpretation of Congressman Moss' remarks disregards the context in which the statement was made, as well as the evident purpose of the amendment. 65/ In summary, the

(footnote continued from page 42) Sess. 2 (1958). See Clement, supra at 621 n. 147. The debates on the amendment focused on this problem and did not address the issue of agency disclosure under § 301. Hence, the remark of Congressman Meader, cited by Chrysler at p. 49, represents an isolated comment and not the thrust of the debate on the purpose of the amendment.

64/ 104 Cong. Rec. 6550 (1958)(emphasis added).

65/ Chrysler Corp., 565 F.2d at 1187.

1958 amendment was added to assure that § 301 would not be used by agencies as colorable authority for withholding information. At the same time, Representative Moss simply took pains to indicate that the 1958 amendment itself was not meant to repeal § 1905. But the amendment in no way curtails preexisting agency authority under § 301 to promulgate disclosure regulations which, operating within the framework of § 1905, provide "authority" for disclosure.

b. Executive Order 11246. Although explicitly left open by the court of appeals, 66/ Executive Order 11246, as amended, provides a separate source of authority for the regulations at issue in this case. Executive Order 11246 establishes a national policy to prevent employment discrimination in private businesses contracting with the federal government. Section 201 confers broad authority on the Secretary of Labor to "adopt such rules and regulations as he deems necessary and appropriate to achieve the[se] purposes . . ."

This Court's prior decisions lend firm support to the proposition that § 301 confers upon the Secretary of Labor the authority to promulgate regulations providing for public disclosure of information gathered in an effort to enforce the Executive

---

66/ Chrysler Corp., 565 F.2d at 1188.

Order. 67/ For example, in FCC v. Schreiber, 381 U.S. 279 (1965), the question was whether the FCC had authority to promulgate regulations requiring public disclosure of information obtained in the course of an investigation, unless the FCC's presiding officer found that the public interest would be served by nondisclosure. This Court held that § 4(j) of the Communications Act of 1934, 68/ which empowers the FCC to "conduct its proceedings in such a manner as will best conduce to the proper dispatch of business and to the ends of justice," authorized the public disclosure of information "as the agency may determine to be proper upon a balancing of the public and private interests involved." 69/ In so doing,

---

67/ Grants of agency authority comparable in scope have been held to authorize issuance of disclosure regulations. See FCC v. Schreiber, 381 U.S. 279, 289-94 (1965); Norwegian Nitrogen Co. v. United States, 288 U.S. 294 (1933) (forbidding disclosure). See also Thorpe v. Housing Authority, 393 U.S. 268, 280-81 (1969); Udall v. Tallman, 380 U.S. 1, 16 (1964).

68/ 47 U.S.C. § 154(j)(1976).

69/ FCC v. Schreiber, 381 U.S. at 292. Particularly relevant is this Court's holding that even if the information in question was deemed to contain confidential data or trade secrets, the regulation authorizing disclosure was

(footnote continued on page 46)

this Court stated that so long as the rule is not exercised arbitrarily, it "may not be impeached merely because reasonable minds differ on the wisdom [of it]." 70/ In support of its conclusion, the Court's opinion noted that the Commission had determined that disclosure would serve

> to inform those segments of the public primarily affected by the agency's regulatory policies and those likely to be affected by subsequent administrative . . . action of the factual basis for any action ultimately taken -- a practical inducement to public acceptance of the results of the investigation.
> 381 U.S. at 294.

Similarly, access to the equal employment information which the government seeks to disclose in this instance will inform those "primarily affected" by the Executive Order of the basis for any subsequent action or inaction taken by the Secretary. Moreover, the vigilance of members

(footnote continued from page 45) nevertheless valid because it required a balancing of the private interest in confidentiality and the public interest in disclosure. Id. at 299.

70/ Id. at 292, citing Oklahoma Press Co. v. Walling, 327 U.S. 186, (footnote continued on page 47)

of the public who have a strong interest in halting race and sex discrimination in employment practices, and educated decisions by representatives and officials of local government who have legal responsibility in the field, would clearly be a helpful asset to the government in enforcing the laws which prohibit such practices. Thus, the Secretary's determination that this information should be disclosed was well within the scope of his authority under the Executive Order. 71/

(footnote continued from page 46) 215-218 (1946); Isbrandtsen-Moller Co. v. United States, 300 U.S. 139, 146 (1937); Norwegian Nitrogen Co. v. United States, 288 U.S. at 321-22.

71/ Chrysler's argument that "the routine reference to the Executive Order does not conceal the fact, as the rules themselves state, that the purpose of the regulation is to implement . . . the Freedom of Information Act," Chrysler's Brief at 54, chooses to ignore the explicit reference in the very same section to the "policy of the OFCC to disclose information to the public and to cooperate with other public agencies as well as private parties seeking to eliminate discrimination in employment . . ." 41 C.F.R. § 60-40.1. (Emphasis added.) Hence, the regulations expressly indicate that the purpose of disclosure (footnote continued on page 48)

II. 18 U.S.C. § 1905 DOES NOT QUALIFY AS AN EXEMPTION 3 STATUTE AND THUS DOES NOT EXEMPT FROM DISCLOSURE INFORMATION WHICH WOULD OTHERWISE BE REQUIRED TO BE DISCLOSED UNDER THE FOIA.

Even the reverse FOIA decisions most favorable to Chrysler's view of § 1905 have held that it only comes into play with respect to material found to be exempt from mandatory disclosure under exemption 4 of the FOIA. 72/ However, in an effort to avoid the National Parks test of "substantial competitive harm" under exemption 4, 73/ (and in hopes that this Court will disregard the arguments advanced above concerning the applicability here of § 1905), Chrysler argues that § 1905 qualifies as an exemption 3 statute. As such, Chrysler asserts, a test of confidentiality under § 1905 stricter than that of exemption 4 operates as an independent bar to the

(footnote continued from page 47)
is to further the ends of the Executive Order.

72/ See, e.g., the Fourth Circuit's decision in Westinghouse Electric Corp. v. Schlesinger, 542 F.2d at 1204 n.38, 1207, where the court held that § 1905 and the FOIA's exemption 4 are coextensive in scope. See also Charles River Park, 519 F.2d at 941-942 n.7.

73/ See discussion supra at 15 n. 21.

government's effort to disclose equal employment opportunity data.

Amici join Chrysler in urging this Court to resolve the exemption 3 question. 74/ Before turning to the more technical analysis of exemption 3's terms, however, amici submit that an examination of the relationship between § 1905 and the FOIA itself reveals that, irrespective of the exact wording of exemption 3, § 1905 cannot function as an independent bar to disclosure under the FOIA. This conclusion is based on the simple, common sense need to read two separate statutes in a fashion that preserves a role for each and that accords a proper respect to Congress' deliberations leading to the passage of the FOIA.

Section 1905, on its face, constitutes a general prohibition against unauthorized disclosure of confidential commercial or financial information. Since exemption 4 of the FOIA deals specifically with this type of information, if the material sought does not fall within exemption 4, the FOIA should be read not only to "authorize,"

74/ Even if this Court agrees with the view that § 1905 is only applicable to material within exemption 4, thus rendering the question of whether § 1905 functions independently as a bar to disclosure under exemption 3 of little practical import, a final resolution of this issue by this Court
(footnote continued on page 50)

but actually to require, its disclosure. 75/ In short, the only rational way to reconcile § 1905 with the FOIA is first to consider whether the information in question falls within the protection from mandatory disclosure provided by exemption 4 and, if it does, only then to turn to an analysis of § 1905. To treat § 1905 as yet another FOIA exemption for commercial information renders a nullity Congress' carefully crafted protection for confidential commercial information contained in exemption 4. Moreover, the interpretation of the interrelationship of § 1905 and exemption 4 urged by amici does not strip § 1905 of any mission of its own. To the extent that disclosure is not mandated under the FOIA, § 1905 stands as a check, through its "authorized by law" caveat, on the agency's discretion to disclose. See discussion at pp. 32-40, supra.

(footnote continued from page 49)
will remove unnecessary confusion and lead the way to a clear and consistent approach to reverse FOIA cases.

75/ It begs the question to argue that, in assessing the authority provided by the FOIA, one must treat § 1905 as an exemption 3 statute. Because of § 1905's qualification, unless "authorized by law," such an approach simply leads to a circular process whereby each statute unsuccessfully seeks to determine its applicability from the other. See Charles River Park,
(footnote continued on page 51)

This interpretation of the relationship between § 1905 and exemption 4 gains support from the recent legislative history of exemption 3. That exemption originally covered documents "specifically exempted from disclosure by statute." 5 U.S.C. 552(b)(3)(1970). Congress amended exemption 3 in 1976 to conform to its sister provision in the Government in the Sunshine Act, 76/ and to expressly overrule this Court's decision in Administrator, FAA v. Robertson, 422 U.S. 255 (1975). In the initial legislative action leading to that amendment, the House Government Operations Committee considered the interrelationship of the FOIA and § 1905 and concluded:

> [T]he Trade Secrets Act, 18 U.S.C. § 1905, which relates only to the disclosure of information where disclosure is 'not authorized by law,' would not permit the withholding of information otherwise

(footnote continued from page 50)
519 F.2d at 941-942 n. 7; National Parks and Conservation Association v. Kleppe, 547 F.2d 673, 686-687 (D.C. Cir. 1976). Accord, Clement, supra, at 617 n. 129; K. Davis, Administrative Law of the Seventies § 3A.18 at 88, 89 (1976). But see Sears, Roebuck & Co. v. GSA, 553 F.2d at 1384-1385; Westinghouse Electric Corp. v. Schlesinger, 542 F.2d at 1215.

76/ Pub.L.No. 94-409, § 3(a), 90 Stat. 1241 (1976) codified at 5 U.S.C. § 552b.

> required to be disclosed by the Freedom of Information Act, since the disclosure is there authorized by law. H.R. Rep. No. 94-880, 94th Cong., 2d Sess. Part I at 23 (1976).

This same Report went on to state:

> . . . on the other hand, if material is within the trade secrets exemption of the Freedom of Information Act and therefore subject to disclosure if the agency determines that disclosure is in the public interest, section 1905 must be considered to ascertain whether the agency is forbidden from disclosing the information. Charles River Park "A", Inc. v. Dept. of Housing and Urban Development, 519 F.2d 935, 941 n. 7 (D.C. Cir. 1975). 77/

77/ Id. Amici are aware that the final version of exemption 3 was rewritten in conference, H.R. Rep. No. 1441, 94th Cong., 2d Sess. 8 (1976). However, the quoted passages are nevertheless quite germane to an understanding of the relationship between the FOIA and §1905. First, the difference between the final version of exemption 3 and that proposed by the House Committee on Government Operations is irrelevant for
(footnote continued on page 53)

Even when considered independently of exemption 4, § 1905 simply does not qualify as an exemption 3 statute under the 1976 amendment. In Administrator, FAA v. Robertson, 422 U.S. at 264, 265, this Court based its decision in part on the conclusion that the FOIA was not intended to repeal prior nondisclosure statutes. Congress subsequently amended exemption 3 with the explicit purpose of "overrul[ing] the decision of the Supreme Court in . . . Robertson . . . ." H.R. Rep. No. 1441, 94th Cong., 2d Sess. 14 (1976) (conference report). 78/ While this

(footnote continued from page 52)
this purpose because the Committee's interpretation was not tied to any particular wording of exemption 3, but rather was based on the relationship between § 1905 and the FOIA itself. Second, those later considering exemption 3, including the conferees, never contradict these statements, although one would have expected expressions of disagreement given the notoriety of the issue. Cf. American Jewish Congress v. Kreps, No. 76-1559, slip op. at 10 n. 36 (D.C. Cir. March 15, 1978)(". . . the report of that committee [House Committee on Government Operations] is not an inappropriate tool for divination of the interest of the Congress as a whole, especially since each House had an opportunity to object to interpretations contained in that report.")

78/ We are frankly puzzled by Chrysler's reliance on Robertson, Westinghouse
(footnote continued on page 54)

Court may have felt bound by the legislative history of the original exemption 3 which indicated an intent that the FOIA not affect the applicability of the "nearly 100 statutes . . . which restrict public access to specific Government records . . .", 79/

(footnote continued from page 53) Electric Corporation v. Schlesinger, and Sears, Roebuck & Co. v. GSA, as well as the amendment to exemption 3 itself, for the proposition that prior decisions holding that § 1905 did not qualify as an exemption 3 statute under the original version of exemption 3 "too narrowly construed the third exemption," Chrysler's Brief at 57. Chrysler simply ignores the fact that the express purpose of the amendment was to narrow the exemption and to overrule Robertson. Because Westinghouse relied extensively on Robertson, the continued validity of the Westinghouse holding on this issue has been questioned even within the Fourth Circuit. See Crown Central Petroleum Corp. v. Kleppe, 424 F. Supp. 744, 753 (D. Md. 1976); Westinghouse Elec. Corp. v. Brown, 443 F. Supp. 1225, 1232-1233 (E.D. Va. 1977).

79/ H.R. Rep. No. 1497, 89th Cong., 2d Sess. 2427, reprinted in [1966] U.S. Code Cong. & Ad. News 2418.

Also, the interpretation of § 1905 urged by amici here would not in fact constitute a major departure from that statute's mode of operation, (footnote continued on page 55)

the 1976 amendment makes absolutely clear that certain of these pre-existing nondisclosure statutes do not exempt material under the FOIA.

Rather than set forth those statutes which would or would not fall under the amended exemption 3, Congress carefully set forth standards governing the types of statutes which would qualify, limiting exemption 3 to any statute which "(A) requires that matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld." 80/ Applying these standards to § 1905, it cannot be interpreted as a barrier to the release of information under exemption 3.

Subsection (A) of exemption 3 does not allow for any decisionmaking at the administrative level. It incorporates only those statutes which evidence a congressional mandate of confidentiality that is "absolute and without exception." 81/ By its express terms, § 1905

(footnote continued from page 54) because § 1905, unlike other statutes referred to in the House Report, has always been tied to other laws which "authorize" disclosure.

80/ 5 U.S.C. § 552(b)(3).

81/ 122 Cong. Rec. No. H9260 (daily ed. Aug. 31, 1976)(remarks of Representative Abzug).

does not absolutely bar disclosure of information falling within its scope, but rather, prohibits only those disclosures made "in any manner or to any extent not authorized by law." As discussed above, at pp. 33-40, validly enacted agency regulations "authorize" disclosure of information falling within § 1905 and, in any case, even Chrysler would presumably concede that another statute granting explicit discretion to disclose would fall within § 1905's qualifying language. Hence, § 1905 does leave some discretion on the issue of disclosure to the agency and therefore cannot qualify as an exemption 3 statute under subsection (A).

Chrysler also relies upon the second part of exemption 3. 82/ We submit, however, that a statute should be deemed to qualify under subsection (B) only if it evidences a congressional determination that specific documents must be kept confidential, or at least provides a precise test that the administrator can apply to determine whether release would pose the dangers

82/ Section 1905 clearly does not call into play the first part of subsection (B) -- a statute containing particular criteria for withholding. Section 1905 provides no criteria for withholding and Chrysler does not contend otherwise. Chrysler's Brief at 58.

contemplated by Congress. It is critical to note that § 1905 on its face is a "statute of general applicability and not one that specifically defines or categorizes the information" falling within its scope, 83/ much less provides a ready test for determining applicability. 84/

We base our conclusion in part on the thorough analysis of the 1976 amendment to exemption 3 contained in the D.C. Circuit's opinion in American Jewish Congress v. Kreps, No. 76-1559 (D.C. Cir. March 15, 1978). There the court emphasized the unmistakable purpose of the amendment "to assure that basic policy decisions on government secrecy be made by the Legislative rather than the Executive Branch," 85/ and accordingly held that at a minimum

83/ National Parks, 547 F.2d at 686, citing Grumman Aircraft Engineering Corp. v. Renegotiation Board, 425 F.2d 578, 580 n.5 (1970); see also K. Davis, Administrative Law of the Seventies § 2A.18 at 88, 89 (§ 1905 not within exemption 3), citing M.A. Schapiro & Co. v. SEC, 339 F. Supp. 467, 469-70 (D.D.C. 1972).

84/ Cf. Westinghouse Electric Corporation, 542 F.2d at 1204, 1207, and Charles River Park, 519 F.2d at 941, which have looked to exemption 4 as a guide to § 1905's reach.

85/ American Jewish Congress, slip op. at 9, citing H.R. Rep. No. 880, Pt. 1, 94th Cong., 2d Sess. 23 (1976).

an exemption 3 statute must contain a "formula" so that the administrator can be assured of fulfilling Congress' mandate. On this basis, the court concluded that the statute involved in that case 86/ did not qualify as an exemption 3 statute

> . . . if for no other reason than that the agency had the power radically to expand the quantity and diversity of information in its files to intercept matter of a sort that Congress well might not have contemplated when considering the need for confidentiality. 87/

Similarly, the mere fact that § 1905, read literally, would apply to "virtually every category of business information likely to be in the files of any federal agency," dispels the contention that § 1905 represents a congressional determination of the advisability of secrecy for "any particular types of matters." When § 1905 was codified in 1948, Congress clearly did not envision the types of information which are the subject of this litigation. Indeed, the ever increasing and changing types of business information in the files of federal agencies, and the control by the agencies themselves over the precise information

86/ Section 7(c) of the Export Administration Act, 50 U.S.C. App. § 2406(c) (1970).

87/ American Jewish Congress, slip op. at 14-15.

which must be submitted, demonstrates that Congress has not engaged in the crucial determination under subsection (B) that "particular types of matter" falling within the literal reach of § 1905 must be protected against disclosure. Hence, § 1905 is precisely the type of statute which Congress intended to remove from the ambit of exemption 3 when it amended that provision in 1976.

III. THE PROPER STANDARD OF JUDICIAL REVIEW IN REVERSE FOIA CASES IS WHETHER, BASED ON THE ADMINISTRATIVE RECORD, THE AGENCY'S DECISION WAS "ARBITRARY AND CAPRICIOUS"

The court of appeals was correct in holding that the scope of judicial review in reverse FOIA cases is limited by 5 U.S.C. § 706(2)(A) to a determination on the basis of the agency record whether the agency's decision to disclose the requested information was "arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law." 88/ This conclusion is mandated by the reasoning of

88/ Chrysler Corp., 565 F.2d at 1192-93. Chrysler argues to the contrary that de novo review is warranted, relying in part upon Westinghouse Electric Corp. v. Schlesinger, 542 F.2d at 1205-1216, which held that de novo review was appropriate in reverse FOIA cases because an implied cause of action exists under either the FOIA or § 1905. These argu-

(footnote continued on page 60)

this Court's opinions on the proper scope of review under the Administrative Procedure Act, and the clearly expressed policies of the FOIA.

(footnote continued from page 59)
ments have been thoroughly discussed and properly rejected both by the court of appeals below and by the other courts of appeals addressing reverse FOIA issues. See Sears, Roebuck & Co. v. Eckerd, slip op. at 12; General Dynamics, 572 F.2d at 1217, 1218; Pennzoil Co. v. FPC, 534 F.2d 627, 631 (5th Cir. 1976). For a thorough discussion of an implied § 1905 cause of action, see Sears, Roebuck & Co. v. Eckerd, slip op. at 10-12; and, generally, Clement, supra, at 624-626.

Moreover, this Court has frequently held that de novo review of agency decisionmaking is unavailable in the absence of Congressionally created standards and procedures for judicial review. See United States v. Carlo Bianchi & Co., Inc., 373 U.S. 709 (1963); National Broadcasting Co. Inc., v. United States, 319 U.S. 190 (1943); Tagg Bros. & Moorhead v. United States, 280 U.S. 420 (1930). Hence, even if a cause of action could be implied under § 1905 or the FOIA, neither of those statutes provides standards and procedures for review of an agency's decision to disclose requested information. Accordingly, the APA "abuse of discretion" standard of review would still be applicable. Compare the court of appeals' discussion of a possible cause of action and de novo review under the Declaratory
(footnote continued on page 61)

Since Congress did not explicitly anticipate reverse FOIA actions, the Act is silent as to the proper scope of review in these cases. Absent an express provision for judicial review, a reverse FOIA lawsuit brought under the APA must be governed by § 706(2)(A), the APA scope of review provision. According to this Court in Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415 (1971), de novo review is proper under § 702(2)(A) in only two limited circumstances:

> First, when the action is adjudicatory in nature and the agency fact-finding procedures are inadequate. . . . And, . . . when issues that were not before the agency are raised in a proceeding to enforce nonadjudicatory agency action.

(footnote continued from page 60)
Judgment Act, 28 U.S.C. § 2201, rejected, inter alia, because it would "transfer primary decisional responsibility for agency disclosure from the administrative agencies to the federal courts . . ." 565 F.2d at 1191. In sum, given jurisdiction under 28 U.S.C. § 1331, and the applicability of the APA, we cannot imagine any reason to distinguish reverse FOIA agency decisions from any other type of agency decision in which the APA's standard of review governs.

Neither of these two circumstances was present in this case. 89/

An agency's determination to comply with a requester's FOIA request is adjudicatory in nature and a submitter's action to enjoin disclosure is clearly not a "proceeding to enforce nonadjudicatory agency action." Hence,

89/ In Charles River Park, 519 F.2d at 940-941 n. 4, the D.C. Circuit held that Overton Park is inapposite to a district court's inquiry into the applicability of the FOIA exemptions because the inquiry does not constitute judicial review of agency action, but merely represents a threshold determination whether submitters have a cause of action. Chrysler embraces this holding and tries to extend it across the range of decisions arising in a reverse FOIA case, partially on the basis of a claim that no "discretion is involved in agencies' decisions to disclose." Chrysler Brief at 70, 71. But however the question is framed, what is at issue is still an agency decision, at least in part based on factual determinations. If that decision is wrong as a matter of law, then of course it must be overruled but that does not alter the appropriateness of § 706(2)(A)'s test.

Moreover, as one observer noted, "[s]ince the FOIA exemptions are permissive . . . district courts cannot determine that submitters have a cause of action merely by finding the

(footnote continued on page 63)

de novo review is justified in reverse FOIA lawsuits only if the agency factfinding procedures on which the disclosure decision was based are inadequate. 90/

The factfinding procedures in this case were not inadequate; nor is the regulatory framework "inherently" inadequate as Chrysler contends. 91/ Chrysler's Brief at 72-81. In assessing Chrysler's claim, several points should be kept in mind. First, OFCC's disclosure regulations, 41 C.F.R. Part 60-40, have been the law since 1973. Therefore, Chrysler and other government contractors have long known of the risk of FOIA requests for their affirmative action submissions

(footnote continued from page 62)
exemptions applicable. Agencies have discretion to disclose exempt information to the extent permitted by other laws. Therefore, despite the court's analysis in Charles River Park, a district court inquiring into the applicability of the FOIA exemptions engages in judicial review of an agency determination, which the APA governs." Clement, supra, at 631 n. 206.

90/ This prohibition against de novo review forbids both a trial de novo (i.e., taking of testimony on the submitter's claim of substantial competitive injury) and review de novo (reviewing the agency's decision afresh, rather than by the abuse of discretion standard).

91/ The district court did not hold otherwise. Chrysler Corp., 565 F.2d at 1179.

and have had ample time to consider the legal and factual arguments relevant to a claim that disclosure should not be made. Second, the data in question here are highly repetitive and quite standardized: EEO-1's, AAP's and investigatory material bearing on employment practices. Thus, contrary to Chrysler's implications, neither the burden of developing legal and factual arguments regarding alleged confidentiality, nor the level of sophistication or technical expertise needed to assess those arguments, is particularly substantial. 92/ Moreover, whatever the practices of different agencies at different times, Chrysler was provided immediate notice of the requests here. 93/ And Chrysler certainly

92/ In fact, given the nature of the information, it is likely that OFCC has over the years validly developed a view regarding the harm which release of this type of information could cause. It is hard to imagine that competitive impact would vary widely from industry to industry.

93/ Chrysler Corp., 565 F.2d at 1179. Accordingly, Chrysler's assertion that "neither the FOIA nor most agency regulations require that notice be provided . . . and, in practice, many agencies often do not provide such notice," Chrysler's Brief at 78, is irrelevant. In any event, a review of the reported cases reveals that in most instances the submitter has in fact
(footnote continued on page 65)

availed itself of the opportunity to object, contending, inter alia, that the information was exempt from disclosure under the FOIA and that disclosure of certain information was prohibited by § 1905 and the Department of Labor's disclosure regulations. And the decision to release the documents was only made after the agency concluded that it had "fully considered" Chrysler's arguments. 94/ Hence, the district court was not presented with any issues not considered in the administrative process.

(footnote continued from page 64)
received prompt notice that a request for information has been made and has been given an ample opportunity to respond. See, e.g., Westinghouse Elec. Corp. v. Schlesinger, 542 F.2d at 1196; Parkridge Hosp. Inc. v. Blue Cross and Blue Shield, 430 F. Supp. 1093, 1095 (E.D. Tenn. 1977), appeal pend., No. 77-1576 (6th Cir. June 7, 1977); General Dynamics Corp. v. Dunlop, 427 F. Supp. 578, 580 (E.D. Mo. 1976); Metropolitan Life Ins. Co. v. Usery, 426 F. Supp. at 154; Crown Central Petroleum Corp. v. Kleppe, 13 FEP Cases 1337, 1338 (W.D. Tenn. 1976); McCoy v. Weinberger, 386 F. Supp. 504, 506 (W.D. Ky. 1974); Sears, Roebuck & Co. v. GSA, 384 F. Supp. 996, 999 (D.D.C. 1974).

94/ Chrysler Corp., 565 F.2d at 1179.

In addition to the actual procedures followed upon receipt of the FOIA request here, 41 C.F.R. § 60-60.4(d) also provides that the employment information which Chrysler is required to submit may be claimed to be confidential and non-disclosable at the time it is submitted. The regulation provides for a determination of a submitter's confidentiality claims by the receiving agency within ten days, and an appeal to the Director of OFCCP which also must be decided in ten days. The decision of the Director is a final agency decision, reviewable under 5 U.S.C. §§ 701 et seq. 95/ Chrysler contends, however, that it would place an unreasonable burden on submitters to object to disclosure of information at the time it is submitted. Chrysler's Brief at 75 n. 83. But, as indicated above, the burden with respect to this affirmative action information is in fact not great. Indeed, under the circumstances it would appear that Chrysler could easily prepare a document setting forth its claims of confidentiality which could be routinely attached to each submission. 96/

95/ Chrysler Corp. v. Schlesinger, No. 75-159 (D. Del., June 17, 1976), Chrysler's Petition, App. B. at 56a.

96/ Chrysler Corp., 565 F.2d at 1179. The Third Circuit also held that the agency record did not sufficiently explain the basis of the agency
(footnote continued on page 67)

Finally, Chrysler complains that the procedures provided are inadequate, because of limits in the ability to provide testimonial evidence and to cross-examine government experts. Chrysler Brief at 78. But as this Court recently held in Vermont Yankee Nuclear Power Corp. v. NRDC, Inc., 46 U.S.L.W. 4301 (April 3, 1978), agency selection of the procedures to be followed in the course of reaching governmental decisions should be accorded substantial deference by the courts, at least when minimal safeguards are provided. Chrysler cannot seriously contend that expert testimony and cross-examination fall within the minimal safeguards required of the government before it can release affirmative action information.

(footnote continued from page 66)
decision to disclose the requested information, and remanded the case to the agency for a further explanation. Without commenting on the court's determination that the agency record was inadequate, amici endorse the use of the rule announced by this Court in Camp v. Pitts, 411 U.S. 138, 142-43 (1973):

> If . . . there was such failure to explain administrative action as to frustrate effective judicial review, the remedy was not to hold a de novo hearing, but as contemplated by Overton Park, to obtain from the agency either through affidavits or

(footnote continued on page 68)

For all these reasons, the Third Circuit correctly held that the district court's de novo review of the agency decision to disclose the employment information submitted by Chrysler was improper. 97/

This limited availability of de novo review is also consistent with the congressional intent underlying the FOIA. Congress urged courts and agencies to "emphasize the fullest responsible disclosure" when balancing the interests of confidentiality against the public's right to know. Congress also indicated its intent, recently reiterated in the 1974 FOIA Amendments, that the courts should expedite FOIA cases "in every way." 98/ Permitting courts to review de novo an agency's decision to disclose requested information would compromise these ob-

---

(footnote continued from page 67)
testimony, such additional explanation of the reasons for the agency decision as may prove necessary.

97/ S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965); see also H.R. Rep. No. 1497, 89th Cong., 2d Sess. 12, reprinted in [1966] U.S. Code Cong. & Ad. News, 2418, 2429; H.R. Rep. No. 92-1419, 92d Cong., 2d Sess. 3, 11, 14, 17 (1972); S. Rep. No. 93-854, 93rd Cong., 2d Sess. 1 (1974).

98/ 5 U.S.C. § 552(a)(4)(D).

jectives and would divert judicial time and resources to consideration of issues which Congress intended to be decided by the agencies.

Although the above analysis results in a different standard of review of agency decisions for requesters (de novo under 5 U.S.C. § 552(a)(4)(B)), and submitters, this result is fully warranted by the legislative history of the FOIA. 99/ Congress passed the FOIA in 1966 100/ because agencies were using the original public information section of the Administrative Procedure Act 101/as colorable authority for wrongfully denying requests for information. As noted in the Senate Report accompanying the FOIA:

> It is the conclusion of the committee that the present section 3 of the Administrative Procedure Act is of little or no value to the public in gaining access to records of the Federal Government. Indeed, it has had precisely the opposite effect; it is cited as statutory authority for the

---

99/ See generally Clement, supra, at 630-31.

100/ Pub. L. No. 89-554, 80 Stat. 383 (1966).

101/ Ch. 324, § 3, 60 Stat. 238 (1946).

> withholding of virtually any piece of information that an official or any agency does not wish to disclose. S. Rep. No. 813, 89th Cong., 1st Sess. 4 (1965).

Similarly, the House Report concluded:

> Section 3 of the Administrative Procedure Act (5 U.S.C. 1002), though titled "Public Information" and clearly intended for that purpose, has been used as an authority for withholding rather than disclosing, information . . . For more than 10 years, through the administrations of both political parties, case after case of improper withholding based upon 5 U.S.C. 1002 has been documented. H.R. Rep. No. 1497, 89th Cong., 2d Sess. 4-5, reprinted in [1966] U.S. Code Cong. & Ad. News 2418, 2421-22.

As one means of rectifying this pervasive pattern of wrongful agency withholding of information, and of implementing the underlying policy of the "fullest responsible disclosure," 102/ Congress specifically provided for de

102/ S. Rep. No. 813, supra, at 3 (1965).

novo judicial review of an agency's denial of an FOIA request. The Senate report referred to this right of requesters to de novo review as "essential in order that the ultimate decision as to the propriety of the agency's action is made by the court and to prevent it from becoming meaningless judicial sanctioning of agency discretion." 103/

Hence, the legislative history of the FOIA makes it clear that de novo review was provided as a protection for requesters against over-withholding of information by agencies. The poor track record of agency disclosure convinced Congress that de novo review of an agency's decision to withhold documents was necessary to counterbalance agency tendencies to refuse disclosure. Judicial creation of a comparable right of de novo review for submitters would not only be contrary to the legislative scheme envisioned by Congress, but could serve to undermine this specifically created incentive for agencies to disclose rather than withhold requested information -- a result inimical to Congress' strongly expressed commitment to disclosure as the chief policy of the FOIA. Under the circumstances, a decision to alter the situation should reside with Congress, not with the courts.

103/ S. Rep. No. 813, supra, at 8 (1965).

CONCLUSION

For the reasons set forth above, the court of appeals' decision should be upheld.

Respectfully submitted,

Charles E. Hill

A. Brynne Mayerson

600 New Jersey
Avenue, N.W.
Washington, DC 20001
(202) 624-8390

Attorneys for Amici
Curiae */

August, 1978

*/ This brief was prepared with the assistance of Kathryn Russell, a third year Georgetown University Law Center student.

APPENDICES

APPENDIX A

18 U.S.C. § 1905:

Whoever, being an officer or employee of the United States or of any department or agency thereof, publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined not more than $1,000, or imprisoned not more than one year, or both; and shall be removed from office or employment.

18 U.S.C. § 216 (1940):

Disclosing operations of manufacturers, and income-tax returns.

It shall be unlawful for any collector, agent, clerk, or other officer or employee of the United States to divulge or to make known in any manner whatever not provided

by law to any person the operations, style of work, or apparatus of any manufacturer or producer visited by him in the discharge of his official duties, or the amount or source of income, profits, losses, expenditures, or any particular thereof, set forth or disclosed in any income return, or to permit any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; and it shall be unlawful for any person to print or publish in any manner whatever not provided by law any income return, or any part thereof or source of income, profits, losses, or expenditures appearing in any income return; and any offense against the foregoing provision shall be a misdemeanor and be punished by a fine not exceeding $1,000 or by imprisonment not exceeding one year, or both, at the discretion of the court; and if the offender be an officer or employee of the United States he shall be dismissed from office or discharged from employment.

19 U.S.C. § 1335 (1940):

Penalty for disclosure of trade secrets.

It shall be unlawful for any member of the commission, or for any employee, agent, or clerk of the commission, or any other officer or employee of the United States, to divulge, or to make known in any manner whatever not provided for by law, to any person, the trade secrets or processes of any person, firm, copartner-

ship, corporation, or association embraced in any examination or investigation conducted by the commission, or by order of the commission, or by order of any member thereof. Any offense against the provisions of this section shall be a misdemeanor and be published by a fine not exceeding $1,000, or by imprisonment not exceeding one year, or both, in the discretion of the court, and such offender shall also be dismissed from office or discharged from employment.

15 U.S.C. § 176a (1940):

Information furnished in confidence; disclosure prohibited. -- Any statistical information furnished in confidence to the Bureau of Foreign and Domestic Commerce by individuals, corporations, and firms shall be held to be confidential, and shall be used only for the statistical purposes for which it is supplied. The Director of the Bureau of Foreign and Domestic Commerce shall not permit anyone other than the sworn employees of the Bureau to examine such individual reports, nor shall he permit any statistics of domestic commerce to be published in such manner as to reveal the identity of the individual corporation, or firm furnishing such data.

15 U.S.C. § 176b (1940):

Penalty. -- Any employee of the Bureau of Foreign and Domestic Commerce violating any of the provisions of this Act [§ 176a of this title] shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in any sum not exceeding $1,000 or imprisoned not exceeding one year, or both.

APPENDIX B

THE LEGISLATIVE HISTORY OF 18 U.S.C. § 216, § 1905's PRIMARY PREDECESSOR STATUTE.

Amici submit that the narrow focus of 18 U.S.C. § 216 upon information gathered in connection with the taxation process is clearly demonstrated by the following facts relating to § 216's legislative history and that of the statutes which gave rise to it.

1. The first non-disclosure statute in the line of statutes culminating in 18 U.S.C. § 216 appeared in the Internal Revenue Law of 1864, Act of June 30, 1864, ch. 173, § 38, 13 Stat. 238, and reads as follows:

> Provided, That if any [assessor, or assistant assessor, or any collector or deputy collector, revenue agent or inspector] shall divulge to any party, or make known in any manner other than is provided in this act, the operations, style of work, or apparatus of any manufacturer or producer visited by him in the discharge of official duties, he shall be subject to the penalties prescribed in section thirty-five [thirty-six] of this act. (Emphasis added.)

2. Section 38 of the Internal Revenue Law went through successive codifications and reenactments in sub-

stantially the same form until 1894. See Revised Statutes of the United States (Laws in Force, December 1, 1873) § 3167, 18 Stat. (pt. 1) 607 (609); Act of March 1, 1879, ch. 125, § 2, 20 Stat. 329. By the Act of August 27, 1894, ch. 349, § 34, 28 Stat. 557, this section, bearing the number § 3167, was amended to include the prohibition on disclosure of sources of income, profits, losses and similar information originating in income tax returns. As a result of this addition, § 3167 read substantially the same as § 216.

3. Section 3167 was successively reenacted in various revenue acts passed by Congress until 1926. See Act of October 3, 1913, ch. 16, § II, 38 Stat. 177; Act of September 8, 1916, ch. 463, § 16, 39 Stat. 773; Revenue Act of 1918, Feb. 24, 1919, ch. 18, § 1317, 40 Stat. 1146; Revenue Act of 1921, ch. 136, § 1311, 42 Stat. 331; Revenue Act of 1924, ch. 234, § 1018, 43 Stat. 345; Revenue Act of 1962, ch. 27, § 1115, 44 Stat. 117.

4. In 1926, the first official restatement and codification of United States law since 1878 was published as "The Code of Laws of the United States of America of General and Permanent Character in Force December 7, 1925," Act of June 30, 1926, ch. 712, 44 Stat. (pt. 1) 1. It was in this codification that § 216 first appears in the Criminal Code, placed under the chapter dealing with "Offenses Relating to Official Duties." Before 1926, the laws from which § 216 was derived appeared exclusively among

the Internal Revenue laws and were totally absent from the Criminal Code. 1/

It should be noted that in the initial portion of this first version of § 216, reference to revenue officers and agents, as such, had been eliminated by the substitution of the terminology "any clerk, or other officer or employee of the United States . . . ." But see Point 6 below. At the same time, § 3167 of the Internal Revenue Code (Title 26) was separated into two sections, section 62 and section 1025, the former dealing exclusively with disclosure of information by revenue officials relating to "operations, style of work or apparatus" and the latter dealing with disclosure by such officials of information from income tax returns.

5. Amici could find no legislative history of the 1926 codification which could shed light on the reasons for placing substantially the same provision both in the Criminal Code and in the Internal Revenue laws. It clearly appears, however, that the intent of the codification was to remain true to the meaning of existing law, not to revise it. Thus, the Preface to the

---

1/ As an illustration, refer to U.S. Compiled Statutes, 1918, an unofficial compilation of U.S. laws. In the Criminal Code of that edition under Chapter heading "Offenses Related to Official Duties," there is no reference to a provision like § 216.

1926 codification states: "No new law is enacted and no law repealed." This guiding principle is repeated in the Statement of the Compilers, found in H. Rep. No. 900, 69th Cong., 1st Sess. at 3 (1926), which notes:

> It is desired to emphasize the fact that the work, being a compilation, contains all the existing law, and that care has been taken not to depart from the language of the original enactments. (Emphasis added.)

Given this aim and mandate of the 1926 codification, amici submit that any application of the prohibition on disclosure contained in § 216 to non-tax areas would be without legislative authority. 2/

6. This conclusion is further reinforced by the legislative history immediately subsequent to the 1926 codification. Congress in 1928 authorized the "preparation of supplements to the code with perfecting amendments," to correct errors discovered in the codification. P.L. No. 621, ch. 910, 45 Stat. 1007 (1928). The 1928 supplement

---

2/ It is also relevant to note that the two earlier, unperfected efforts at codification did not contain the equivalent of § 216 under the criminal (denominated "penal") provisions. See

(footnote continued on page B-5)

amended each of the relevant statutes here, 18 U.S.C. 216, and 26 U.S.C. § 62 and § 1025, rendering them absolutely identical. In so doing, the notes to each tax section expressly stated that the "same provision constitutes" § 216 and the other tax provision. Moreover, corrections to § 216 in the supplement, in particular the insertion of "collector, deputy collector, agent," 3/ are attributed to the unintended omission of these words from the earlier version, although the notes state that § 62 and § 1025, "which are duplicates of this section, show the omitted words." The proclaimed identity of these sections eliminates

---

(footnote continued from page B-4)
H.R. 9389, 66th Cong., 1st Sess. (1919) and H.R. 12, 67th Cong., 1st Sess. (1922). Moreover, the Justice Department indicated its satisfaction with the completeness of the criminal provisions of H.R. 12. In responding to a solicitation of its views on H.R. 12, the Department of Justice, W.C. Herron for the Attorney General, wrote:

> The sections which relate in any way to the criminal law or criminal procedure have been carefully examined, and, so far as it is possible to discover from such examination, no errors or omissions have been noted. H. Rept. No. 2, 68th Cong., 1st Sess. 29 (1923).

3/ See point 4 on B-2 above.

any possible argument that Congress intended § 216 to reach more broadly than § 62 and § 1025, to information concerning "operations, style of work or apparatus" originating outside the taxation function.

7. While § 216 remained unaltered, the internal revenue sections went through another change. In 1932, § 62 and § 1025 were renumbered § 55(f) and § 1828(a)(1), with the former being limited (as in the 1926 codification prior to the 1928 supplement) to information obtained from income tax returns and the latter applying to "operations, style of work or apparatus." Act of June 6, 1932, ch. 209 § 55, 47 Stat. 189. To date, these provisions have remained unchanged in substance, although they have been renumbered again as § 7213(a)(1) and § 7213(b) of Title 26. 4/

4/ It should be noted that each provision, as with § 1905, applies by its terms to "any officer or employee of the United States," without limitation to internal revenue officials.

To avoid confusion, the note which accompanies § 216 in the 1940 edition of U.S.C. may require some explanation. It states:

REPEALED

Insofar as this section related exclusively to internal revenue it was repealed and incorporated as §§ 55(f)(1), 4047(a)(1) of

(footnote continued on page B-7)

8. In summary, the legislative history of § 216 provides no indication of a Congressional intent to broaden the early tax non-disclosure statutes to cover the sort of commercial or financial data which are the subject of this litigation. Indeed, all indications are clearly to the contrary. Any doubt on this point should be finally resolved by a review of an opinion of the Attorney General on the subject, issued in 1937, in response to a request from the Chairman of the Social Security Board. 39 Op. Att. Gen. 1 (1937). The Social Security

---

(footnote continued from page B-6)

Title 26, Internal Revenue Code. See Section 4(a) of enacting sections of the Internal Revenue Code preceeding Subtitle A of Title 26.

Failure to repeal § 216 in light of this note might be thought to support the argument that, despite the absence of any explanatory legislative history, § 216 was indeed meant to extend beyond the reach of § 55(f) and § 4074(a)(1) of Title 26, U.S.C. Perusal of the cross-reference § 4 of the 1939 Internal Revenue Code (Act of February 10, 1939, ch. 2, 53 Stat. 1-504), however, particularly the provisions of § 4(e), indicate quite clearly that § 216 was not repealed because it covered the act of publicizing illegally disclosed taxation information, a matter which does not relate "exclusively to internal revenue . . . ." (note to § 216).

Board sought the Attorney General's opinion on whether it would be a violation of 18 U.S.C. § 216 for the Board to release certain forms, required to be filed by the Social Security Act, to state unemployment compensation authorities who requested the information in the forms for administration of their unemployment compensation laws. In response, the Attorney General stated:

> It has been suggested that section 3167 of the Revised Statutes, as amended (U.S.C. Title 18, sec. 216), is such a prohibiting statute, but I do not so construe that section. Insofar as here pertinent, it relates only to income tax returns; and Form SS-5, when filled out and filed by an employee, is not an income tax return. Moreover, it is a penal statute and must be construed strictly. Its evident purpose is to prohibit the divulging of information connected with a taxpayer's private business and affairs, which information the taxpayer is required to furnish on his income tax returns, and the divulging of which might be a source of annoyance, embarrassment, or injury to the taxpayer. (Emphasis supplied.) 39 Op. Att. Gen. at 2.

The failure of the Attorney General even to consider the possibility that § 216 extended to information covering employers' "operations" or "style of work" originating outside the taxation process speaks eloquently for the narrow view of § 216 which amici urge here.

9. At the same time, amici could find no reported cases under § 216 which might provide authority contrary to that set forth above. Cf. United States v. Olster, 14 F. Supp. 623 (M.D. Pa., 1936) and In Re International Corporation Co. 5 F. Supp. 608 (S.D.N.Y. 1934), both decided after the appearance of § 216 but making no mention of that section. In fact, the Olster case involved the quashing of an indictment of a deputy internal revenue collector for divulging information from a tax return because the tax involved (processing tax) was an excise, not an income tax. If § 216 was thought to have a breadth as great as that currently contemplated for § 1905, it seemingly would have provided a valid basis for the indictment.

10. The above description of the legislative history of 18 U.S.C. § 216 (1940) and of its predecessor statutes, along with the Attorney General's opinion and the relevant case law, demonstrate beyond doubt that § 216, and by consequence § 1905, was not meant to extend coverage to information concerning "operations, style of work or appartus" or "income, profits, losses, or expenditures" unless such information came into government possession through the taxing process.

MOTION FILED
AUG 9 - 1978

IN THE

Supreme Court of the United States

October Term, 1977
No. 77-922

CHRYSLER CORPORATION,

Petitioner,

vs.

HAROLD BROWN, *et al.*,

Respondents.

On Writ of Certiorari to the Court of Appeals for the Third Circuit.

Motion of Federation of American Hospitals for Leave to File Brief Amicus Curiae.

and

Brief of Amicus Curiae Federation of American Hospitals.

WEISSBURG AND ARONSON. INC.,
ROBERT A. KLEIN,
DAVID REPLOGLE,
2049 Century Park East,
32nd Floor, Two Century Plaza,
Los Angeles, Calif. 90067,
(213) 277-2223,
Attorneys for the Federation of American Hospitals.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

SUBJECT INDEX

Page

Motion of Federation of American Hospitals for Leave to File Brief Amicus Curiae 1

Interest of Federation of American Hospitals 1

Conclusion 2

Brief of Amicus Curiae Federation of American Hospitals 3

I.

Opinions Below 3

II.

Jurisdiction 3

III.

Amicus Curiae 4

IV.

Summary of Argument 5

V.

Argument 6

A. Medicare Cost Reports Contain Confidential Financial Information as Defined by Exemption 4 of the Freedom of Information Act 6

B. Agency Review of Decisions to Release Cost Reports Is Inadequate 7

C. Court Review of Agency Decisions to Release Cost Reports Is Unavailable 9

VI.

Conclusion 12

Appendix A. 1

Appendix B. Findings of Fact and Conclusions of Law 3

Appendix C. Order 20

TABLE OF AUTHORITIES CITED

Cases	Page
Association of American Medical Colleges v. Califano, 569 F.2d 101 (D.C. Cir. 1977)	11
Califano v. Sanders, 430 U.S. 99 (1977)	10, 11
Chelsea Community Hospital v. Michigan Blue Cross, 436 F.Supp. 1050 (E.D. Mich. 1977)	11
Circle Terrace Hospital Corp. v. Group Hospitalization, Inc., No. 77-487-A (E.D. Va. Sept. 6, 1977)	6
Fein v. Selective Service System Local Board No. 7, Yonkers, N.Y., 405 U.S. 365 (1972)	11
Harmon v. Bruckner, 355 U.S. 579 (1958)	11
Hospital Affiliates International, Inc. v. Califano, No. 77-C-3088 (N.D. Ill. Jan. 30, 1978)	6, 7
Medical Center of Independence v. Califano, 433 F. Supp. 837 (W.D. Mo. 1977)	10
St. Louis Univ. v. Blue Cross Hosp. Serv., 537 F.2d 283 (8th Cir. 1976); cert. den. 429 U.S. 977 (1976)	10
South Windsor Convalescent Home, Inc. v. Mathews, 541 F.2d 910 (2d Cir. 1976)	11
U.S. v. California Eastern Line, 348 U.S. 351 (1955)	11
U.S. v. Wunderlich, 342 U.S. 98 (1951)	11
Westchester General Hospital, Inc. v. Department of Health, Education and Welfare, 434 F. Supp. 435 (M.D. Fla. 1977)	7
Weinberger v. Salfi, 422 U.S. 749 (1975)	10, 11

Statutes	Page
United States Code, Title 5, Sec. 701	7
United States Code, Title 18, Sec. 1905	6, 9, 11, 12
United States Code, Title 28, Sec. 1254(1)	3
United States Code, Title 28, Sec. 1331	10
United States Code, Title 42, Sec. 405(a)	9
United States Code, Title 42, Sec. 405(h)	9, 10, 12
United States Code, Title 42, Sec. 1395(h)	9
United States Code, Title 42, Sec. 1395(ii)	9, 10
Regulations	
Code of Federal Regulations, Title 42, Sec. 405.406	5
Code of Federal Regulations, Title 42, Sec. 405.453 (f)	5
Code of Federal Regulations, Title 42, Sec. 422.435	8
Miscellaneous	
American Hospital Association, Hospital Statistics (1975 ed.) at viii and 10	4
Health Insurance Statistics HI-74, Sept. 8, 1976	4
Health Notes, Health Care Financing Administration, May, 1978	4
Rules of Supreme Court of the United States, Rule 42(3)	1

IN THE

Supreme Court of the United States

October Term, 1977
No. 77-922

CHRYSLER CORPORATION,

Petitioner,

vs.

HAROLD BROWN, *et al.*,

Respondents.

On Writ of Certiorari to the Court of Appeals for the Third Circuit.

Motion of Federation of American Hospitals for Leave to File Brief Amicus Curiae.

Pursuant to Rule 42(3) of the Rules of this Court, the Federation of American Hospitals respectfully moves this Court for leave to file a brief amicus curiae in the above-entitled case. Counsel for Respondents have not consented to movant's filing; the Petitioner has granted its consent.

Interest of Federation of American Hospitals.

The Federation of American Hospitals ("FAH") is the national trade association representing the interests of investor-owned hospitals in the United States and its possessions. Ninety to ninety-five percent of the Federation's members participate in the Medicare program and are reimbursed, annually, for approximate-

ly one-fourth of their total patient revenues pursuant to this program. To participate in the Medicare program, each hospital must file with the Department of Health, Education and Welfare a detailed annual financial report.

The question presented in the instant case is a matter of significant importance to hospitals. The court below held that judicial review of agency decisions to release confidential business information is limited to a review of the administrative record. With respect to release of Medicare cost reports there can be no meaningful agency review and there may be no judicial review whatsoever.

As far as is known to FAH, no other amicus has addressed the impact of the decision below on hospitals and other submitters of confidential business information which are afforded no adequate agency and court review. For these reasons, FAH requests this opportunity to present its views to this Court.

Conclusion.

For the above stated reasons, we respectfully urge the Court to grant this motion for leave to file the accompanying amicus brief in the present case in support of the position of the Petitioner.

Respectfully submitted,

WEISSBURG AND ARONSON, INC.,
By ROBERT A. KLEIN,
DAVID REPLOGLE,
Attorneys for the Federation of American Hospitals.

IN THE

Supreme Court of the United States

October Term, 1977
No. 77-922

CHRYSLER CORPORATION,
Petitioner,

vs.

HAROLD BROWN, *et al.*,
Respondents.

On Writ of Certiorari to the Court of Appeals for the Third Circuit.

Brief of Amicus Curiae Federation of American Hospitals.

I.
Opinions Below.

The opinion of the court of appeals is reprinted as Appendix A to the Petition for Writ of Certiorari and is reported at 565 F.2d 1172. The opinion of the district court is reprinted as Appendix B to the Petition for Writ of Certiorari and is reported at 412 F. Supp. 171.

II.
Jurisdiction.

The jurisdiction of this court rests on 28 U.S.C. § 1254(1).

III.
Amicus Curiae.

The Federation of American Hospitals ("FAH"), a nonprofit corporation organized under the laws of the State of New York, is the national trade association representing the interests of investor-owned hospitals in the United States and its possessions. FAH is the recognized spokesman for approximately 1,054 such hospitals. Ninety to ninety-five percent of the investor-owned hospitals in the United States are certified for participation in the Medicare program.[1] Many of the hospitals are owned by multifacility publicly owned companies, some of which also own skilled nursing facilities which participate in the Medicare program. In addition, most of the publicly owned companies provide management, consultation and technical services to many hospitals of all types of sponsorship throughout the United States which also participate in the Medicare program. The hospitals which participate in the program are reimbursed, annually, for one-fourth of their total patient revenues pursuant to this program.[2]

---

[1]In 1974 there were 7,174 hospitals in the United States. *Hospital Statistics* (1975 ed.), American Hospital Association, at viii and 10. According to Social Security Administration statistics, there were 6,733 hospitals certified for participation in the Medicare Program in 1974. *Health Insurance Statistics* HI-74 September 8, 1976. The number of Medicare-certified hospitals represents 93.85% of the number of hospitals identified by the AHA.

[2]In fiscal year 1977 total national inpatient and outpatient hospital expenditures were $65,627,000,000. Of that amount Medicare paid $15,520,000,000, or 23.6%. In the same year the Medicaid program, a joint federal-state program providing medical services to the medically indigent with cost reimbursement procedures similar to those of Medicare, paid $5,964,000,000 of total hospital expenditures. Thus, government medical reimbursement accounted for 32.7% of total U.S. hospital expenditures in 1977. *Health Notes,* Health Care Financing Administration, May 1978.

Each hospital participating in the Medicare program is required to file a "cost report" setting forth the basis of its claims for reimbursement. 42 C.F.R. 405.406 and 405.453(f). Cost reports contain confidential financial and statistical data of a hospital which are generally not released to the public.

FAH, as amicus, does not intend to repeat the arguments of Petitioner and other amici presented to the Court, nor will it seek to identify in detail the adverse effects of releasing Medicare cost reports. This brief is presented to establish one point only: contrary to the conclusions of the court below requiring the administrative agency first to determine questions concerning the release of confidential business information, with limited review of such determinations, there can be no adequate agency review and there may be no judicial review with respect to releasing Medicare cost reports.

IV.
Summary of Argument.

The decision below—that judicial review is limited to a review of the administrative record—rests in part on the assumption that the release of confidential financial information is subject to adequate agency and court review. However, decisions to release Medicare cost reports cannot be subject to adequate agency review. Moreover, according to the government, agency decisions such as whether to release Medicare cost reports are exempt from judicial review. Since the opinion below rests on questionable assumptions, FAH asserts that such decision should be reversed and that submitters of confidential data in Medicare cost reports are entitled to a trial *de novo* on the question of whether confidential business information should be disclosed publicly.

V.

Argument.

A. Medicare Cost Reports Contain Confidential Financial Information as Defined by Exemption 4 of the Freedom of Information Act.

Release of Medicare cost reports is one of the most controversial of FOIA requests. Amicus is aware of at least twenty-three reverse FOIA cases brought to enjoin their disclosure.[3] Each court which reached a decision held that cost reports contain confidential financial information, release of which is prohibited by Exemption 4 of the FOIA, 18 U.S.C. § 1905, or both.[4] Amicus is aware of no trial court which has permitted the release of a cost report.

The cost report contains a detailed breakdown and analysis of the provider's costs and receipts for the fiscal year, and is significantly more detailed than either a federal income tax return or documents filed with the Securities and Exchange Commission. *Hospital Affiliates International, Inc. v. Califano,* No. 77-C-3088, slip op. at 10 (N.D. Ill. Jan. 30, 1978).[5] Its release would supply a competitor with a virtual financial blueprint of the hospital. *Circle Terrace Hospital Corp. v. Group Hospitalization, Inc.,* No. 77-487-A, slip op. at 1 (E.D.Va. Sept. 6, 1977).[6] A competitor could determine with precision the extent of the provider's profitability and the exact method, by department, which the hospital uses to maintain its profitability.

[3]A list of Medicare reverse FOIA cases is attached as Appendix A.

[4]Such holdings were by way of preliminary injunctions, permanent injunctions, or both.

[5]A copy of the decision is attached as Appendix B.

[6]A copy of the decision is attached as Appendix C.

Moreover, release would also have serious anticompetitive and cost-increasing effects. For example, according to the court in *Hospital Affiliates* disclosure of the hospital's wage structure would aggravate industry-wide wage inflation and disclosure of the cost of contracted services would diminish the availability and benefits of competitive bidding.[7]

In general, release of this confidential information would seriously undermine the ability of a hospital to maintain its profitability and competitive position. Accordingly, "once the cost report is released, ... the injury . . . will be complete and irreparable." *Westchester General Hospital,* 434 F. Supp. at 437.

B. Agency Review of Decisions to Release Cost Reports Is Inadequate.

In its decision below, the court of appeals held that judicial review of a determination to release confidential financial information is limited to review of the agency record pursuant to the Administrative Procedure Act, 5 U.S.C. § 701, *et seq.* ("APA"). According to the court, in reviewing an agency decision to release information covered by Exemption 4,

> the court must undertake a two-step analysis. It must first examine whether the agency applied the proper legal standards for the applicability of the FOIA exemptions and, if so, then examine whether the agency considered the proper factors

[7]For a more detailed enumeration of the adverse effects of release of cost reports, *see Hospital Affiliates International v. Califano,* No. 77-C-3088, slip op. at 11-15 (N.D. Ill. Jan. 30, 1978) and *Westchester General Hospital, Inc. v. Department of Health, Education and Welfare,* 434 F. Supp. 435, 437-38 (M.D. Fla. 1977).

in determining that disclosure was permitted under its own disclosure regulations.

565 F.2d at 1192.

The opinion below is based on the premise that the agency will evaluate the specific request and apply certain standards before releasing the information. Court review would be limited to determining whether the agency correctly measured relevant factors against the proper standards.

With respect to release of Medicare cost reports, however, there is no meaningful agency review. Medicare regulations provide that cost reports submitted by providers "*shall* be made available to the public . . . [u]pon request in writing." 42 C.F.R. 422.435. (Emphasis added.) One would expect the agency to follow routinely its own mandatory regulation and release all requested cost reports. Contrary to the assumption underlying the opinion below, the decision to release all cost reports has already been made and agency review is therefore merely perfunctory. The criterion stated by the court below, *i.e.*, whether the agency considered the proper factors in applying its own disclosure regulation, has by definition been met; the regulation requires the disclosure. Further inquiry is therefore obviated. Since there is no actual agency review and thus no record, there is also nothing for a court to review. For these reasons, judicial review of the Medicare Bureau's decision to release confidential cost reports cannot meaningfully be made pursuant to APA procedures.

The problem is exacerbated by the fact that in many instances it is not the Medicare Bureau which releases cost reports under FOIA requests. Rather, they

are often released by the fiscal intermediaries, private insurance companies under contract with the government performing audit and payment services pursuant to Section 1816 of the Social Security Act, 42 U.S.C. § 1395h. Thus, without an implied cause of action under the FOIA or Section 1905, hospitals would be precluded from challenging not only agency determinations but decisions of private companies to release confidential cost reports.

C. Court Review of Agency Decisions to Release Cost Reports is Unavailable.

Assuming that Medicare providers could obtain a meaningful review of the problems involved in releasing cost reports at the agency level, court review of the agency's decision may well be unavailable. According to the government, judicial review of such determinations is precluded by Title XVIII of the Social Security Act (the "Medicare Act").

Congress, in enacting the Medicare Act, incorporated sections of Title II of the Social Security Act limiting judicial review of the Secretary's determinations. Section 1872 of the Social Security Act, 42 U.S.C. § 1395ii. Under Section 205(a) of the Social Security Act, 42 U.S.C. § 405(a), the Secretary is authorized to adopt regulations necessary to carry out the provisions of the law. Section 205(h) of the Social Security Act, 42 U.S.C. § 405(h), as incorporated into the Medicare Act by 42 U.S.C. § 1395ii, provides that:

> The findings and decisions of the Secretary after a hearing shall be binding upon all individuals who are parties to such hearing. No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the

United States, the Secretary, or any officer or employee thereof shall be brought under section 41 of Title 28 to recover on any claim arising under this subchapter.

This Court, in *Weinberger v. Salfi*, 422 U.S. 749 (1975), concluded that Section 405(h) precludes federal question jurisdiction under 28 U.S.C. § 1331, with certain limited exceptions. In *Califano v. Sanders*, 430 U.S. 99 (1977), the Court also eliminated the APA as an independent basis of federal court jurisdiction. Thus the jurisdictional limits imposed by Section 405(h) may preclude review of agency decisions to release cost reports under 28 U.S.C. § 1331 and the APA.

In applying Section 405(h) some courts read the section as an absolute bar to any review of agency decisions except as specifically provided for in Title XVIII. For example, in *Medical Center of Independence v. Califano*, 433 F. Supp. 837 (W.D. Mo. 1977), the court cited *Salfi* and applied the case to Title XVIII claims:

> "That the third sentence of § 405(h) is more than a codified requirement of administrative exhaustion is plain from its own language which states that *no* action shall be brought under § 1331, not merely that only those actions shall be brought in which administrative remedies have been exhausted. 422 U.S. at 756, 95 S.Ct. at 2463. [Emphasis in original]"
>
> Although the claim in *Salfi* arose under Title II of the Social Security Act—and involved a challenge to limitations placed on benefit payments to widows and children of deceased individuals

> covered under the Act—the result reached in *Salfi* clearly applies to the Medicare provisions found in Title XVIII of the Act.

433 F. Supp. at 841 citing *Salfi* at 756. Other decisions precluding court review of the Secretary's decisions under Medicare include *Association of American Medical Colleges v. Califano*, 569 F.2d 101 (D.C. Cir. 1977); *St. Louis Univ. v. Blue Cross Hosp. Serv.*, 537 F.2d 283 (8th Cir. 1976) *cert. denied* 429 U.S. 977 (1976); *South Windsor Convalescent Home, Inc. v. Mathews*, 541 F.2d 910 (2d Cir. 1976); *Chelsea Community Hospital v. Michigan Blue Cross*, 436 F. Supp. 1050 (E.D. Mich. 1977).[8]

The court below determined that neither the FOIA nor 18 U.S.C. § 1905 created a cause of action in submitters of confidential business information to prevent disclosure. 565 F.2d at 1185, 1188. If courts apply *Salfi* and *Sanders* to reverse FOIA Medicare disputes and the decision of the court below is upheld, hospitals will be absolutely barred from challenging agency decisions to release confidential cost reports. Thus, contrary to the conclusion of the court below, judicial review of decisions to release Medicare cost reports may be totally foreclosed.

---

[8]This Court has upheld other jurisdictional limitations on judicial review. *See, e.g., Fein v. Selective Service System Local Board No. 7, Yonkers, N.Y.*, 405 U.S. 365 (1972) (statute barring judicial review of selective service classifications except in limited circumstances upheld); *Harmon v. Bruckner*, 355 U.S. 579 (1958) (statute making decision of Army Discharge Review Board final and subject only to review by the Secretary of the Army upheld); *U.S. v. California Eastern Line*, 348 U.S. 351 (1955) (provision of Renegotiation Act making non-reviewable determinations of excess profits by Tax Court upheld); *U.S. v. Wunderlich*, 342 U.S. 98 (1951) (provision in government contract specifying review is limited to head of department upheld absent fraud).

VI.

Conclusion.

In reaching its conclusion, the court of appeals assumed (1) that there would be an agency determination before confidential information is released, and (2) that a court would be able to review the administrative record to determine whether there was an abuse of discretion. With respect to the release of Medicare cost reports (the question involved in a large number of reverse FOIA cases), neither premise is valid. Agency review is foreclosed by HEW's own regulation, and court review may be foreclosed by 42 U.S.C. § 405(h). Without an implied cause of action under the FOIA or Section 1905, hospitals would be precluded from either meaningful agency review or judicial review to challenge the release of confidential cost reports. For these reasons, amicus urges the Court to reverse the decision below and find that submitters of confidential data are entitled to a trial *de novo* to prevent the government's disclosure of such information to third parties.

Respectfully submitted,

WEISSBURG AND ARONSON, INC.,
By ROBERT A. KLEIN,
DAVID REPLOGLE,
Attorneys for the Federation of American Hospitals.

APPENDIX A.

1. *AID, Inc. v. Califano*, No. 4-78-915 (S.D. Tex.).
2. *Appolo Medical Center, Inc. v. Department of Health, Education and Welfare*, No. 77-671-Civ-J-S (M.D. Fla.)
3. *Circle Terrace Hospital v. Group Hospitalization, Inc.*, No. 77-487-A (E.D. Va., Sept. 6, 1977).
4. *The Diplomat Lakewood, Inc. d.b.a. The Aristocrat Nursing Home—Lakewood v. Blue Cross of Northeast Ohio*, No. C77-718, (N.D. Ohio, Nov. 25, 1977). appeal pending.
5. *Doctors Hosp. of Hollywood v. Department of Health, Education & Welfare*, No. 77-420-Civ-J-S (M.D. Fla.)
6. *Florida Medical Center, Inc. v. Department of Health, Education and Welfare*, No. 77-965-Civ.-J-S, (M.D. Fla. Feb. 3, 1978).
7. *Hospital Affiliates International, Inc. v. Califano*, No. 77 C 3088 (N.D. Ill. Jan. 30, 1978).
8. *Hospital Affiliates International, Inc. v. Califano*, No. 78-226-Civ-J-S. (M.D. Fla. May 31, 1978).
9. *Hospital Development & Service Corp. v. Department of Health, Education and Welfare*, No. 77-966-Civ.-J-S. (M.D. Fla. Feb. 3, 1978).
10. *Humana of Florida, Inc. v. Department of Health, Education and Welfare*, No. 78-72-Civ-J-S, (M.D. Fla. Mar. 22, 1978).
11. *Humana of Virginia, Inc. v. Blue Cross of Virginia*, No. 77-0588-R (E.D. Va. Oct. 13, 1977).
12. *John F. Kennedy Memorial Hospital, Inc. v. Department of Health, Education and Welfare*, No. 78-54-Civ-J-S. (M.D. Fla.)

13. *Laughlin Memorial Hospital, Inc. v. Blue Cross and Blue Shield of Tennessee,* C.A. No. 1-77-318, (E.D. Tenn. Jan. 18, 1978).

14. *McCoy v. Weinberger,* 386 F. Supp. 504 (W.D. Ky. 1974).

15. *Medenco, Inc. v. Califano,* No. H-78-731, (S.D. Tex. Ap. 19, 1978).

16. *Medfield Corp. v. Califano,* No. 76-625-Civ-J-S (M.D. Fla.).

17. *North Florida Regional Hospital v. Mutual of Omaha Ins. Co.,* No. C-77-1808-A, (N.D.Ga. Mar. 31, 1978), appeal pending.

18. *Palm Beach Gardens Community Hospital v. Califano,* No. 76-624-Civ-J-S (M.D. Fla.).

19. *Parkridge Hospital, Inc. v. Blue Cross and Blue Shield of Tennessee,* 430 F. Supp. 1093 (E.D Tenn. 1977) appeal pending.

20. *Redi-Care, Inc. v. Department of Health, Education and Welfare,* No. 78-99-Civ-J-S. (M.D. Fla.).

21. *Psychiatric Institute of Washington, D.C., Inc. v. Group Hospitalization, Inc.,* Medicare & Medicaid Guide (CCH ¶ 28,909 (D.D.C. 1978).

22. *St. Mary's Hospital, Inc. v. Califano,* No. 78-801-Civ-CF, (S.D. Fla. Jan. 19, 1978).

23. *Westchester General Hospital v. Department of Health, Education and Welfare,* 434 F. Supp. 435 (M.D. Fla. 1977).

APPENDIX B.

Findings of Fact and Conclusions of Law.

In the United States District Court, for the Northern District of Illinois, Eastern Division.

Hospital Affiliates International Inc., a Delaware Corporation, and Affiliated Midwest Hospitals, Inc., a Delaware Corporation d/b/a Chicago Lakeshore Hospital and Riveredge Hospital, Plaintiffs v. Joseph A. Califano, Jr., Secretary of Health, Education and Welfare, and Blue Cross Association, and Health Care Service Corporation, Illinois Not-for-Profit Corporations, Defendants. No. 77 C 3088.

The Court having examined various affidavits submitted by the parties, certain documents submitted by the defendants for *in camera* inspection, memoranda of law submitted by the parties, and proposed Findings of Fact and Conclusions of Law submitted by Plaintiffs in support of the grant of Plaintiffs' Motion for a Preliminary Injunction finds:

I
Preliminary Procedural Statement

1.1 Plaintiffs filed this Action on August 19, 1977, seeking preliminary and permanent injunctive relief against the threatened disclosure of certain Medicare cost reports ("the Cost Reports") and the information contained in those documents for any purpose not inextricably tied to the Medicare program. On August 22, 1977, Plaintiffs moved for a Temporary Restraining Order, supported by Affidavits dated August 19, 1977, from Albert J. Gale, Administrator for Riveredge Hospital ("Riveredge") and Jeffrey L. Webster, Controller

for Chicago Lakeshore Hospital ("Lakeshore") verifying Plaintiffs' Complaint, and by the Affidavits of Robert J. Toller, Plaintiffs' Manager of reimbursements, dated August 19, 1977. In opposition to Plaintiffs' Motion for a Temporary Restraining Order, Defendant Health Care Service Corporation ("HCSC") filed an Affidavit from R. Jack Chase, Administrator —Blue Cross Contracts, dated August 23, 1977.

1.2 On August 24, 1977, Plaintiffs' Motion for a Temporary Restraining Order was granted by Judge Joel M. Flaum, restraining Defendants from disclosing Plaintiffs' Cost Reports and the information contained in them pending a ruling on Plaintiffs' Motion for Preliminary Injunction. Thereafter, the parties have agreed to the continuation of the Temporary Restraining Order until a ruling on the pending motion could be made by the Court.

1.3 Pursuant to the Court's request, on November 14, 1977, Defendants provided the Court with copies of the Cost Reports for *in camera* review.

1.4 Plaintiffs have submitted additional Affidavits of Robert J. Toller, dated August 31, 1977, and November 23, 1977, as well as an Affidavit from an independent accounting expert, Allan J. Winnick, a partner in Arthur Andersen & Company, dated November 23, 1977, in support of the Motion for a Preliminary Injunction. Defendants have not submitted any further affidavits or other evidentiary support for their Opposition to Plaintiffs' Motion.

WHEREFORE, on the basis of the various affidavits and other evidence submitted by the parties, including the Court's *in camera* review of the Cost Reports, and after considering the arguments and authorities

advanced in the Memoranda of Law submitted by the parties, the Court reaches the following Findings of Fact and Conclusions of Law:

II

Findings of Fact

2.1 *Identification of Parties*

(a) Affiliates is a Delaware corporation, having its principal place of business in Nashville, Tennessee, and is an investor-owned corporation whose stock is listed on the New York Stock Exchange. Affiliates has been and is engaged in the business of holding stock in various corporations engaged in health care delivery and management.

(b) Midwest is a Delaware corporation, having its principal place of business in Chicago, Illinois, and is a wholly-owned subsidiary of Affiliates. Midwest has been and is engaged in the business of owning and operating hospitals, and does business as Lakeshore and Riveredge.

(c) Defendant Joseph A. Califano, Jr., Secretary of Health, Education and Welfare ("the Secretary"), is the federal officer responsible for (a) the administration of the Social Security Act, including Title XVIII of the Act, 42 U.S.C. §§1395-1395qq ("the Medicare program"), and (b) the actions of parties acting as government agents or agencies under the Act.

(d) Blue Cross Association ("BCA"), is a not-for-profit Illinois Corporation, having its principal place of business in Chicago, Illinois. BCA is a "fiscal intermediary" in the administration of the Medicare program under Section 1816 of the Social Security Act (42 U.S.C. §1395h). As such, BCA acts as an agent of

Defendant Secretary and the Government of the United States in making payment to providers of hospital services, including Lakeshore and Riveredge, for covered services furnished to Medicare beneficiaries, and BCA has the power to delegate its fiscal intermediary duties to local and regional Blue Cross Plans.

(e) Health Care Service Corporation ("HCSC"), is an Iilinois not-for-profit corporation, having its principal place of business in Chicago, Illinois, and is a non-governmetnal organization offering private health insurance programs to the public.

2.2 *Facts Underlying Plaintiffs' Claim.*

(a) Lakeshore and Riveredge are "providers" of hospital services to Medicare beneficiaries as that term is defined in 42 U.S.C. §1395cc. They receive payment directly from Social Security trust funds for covered services furnished to Medicare beneficiaries. The amount of that payment is the portion of their total costs allocable to Medicare patients. Like all other providers, in order to determine total cost and the portion allocable to Medicare beneficiaries, Lakeshore and Riveredge, file annual Mediare cost reports ("the Cost Reports"). 20 C.F.R. § 405.406. The Cost Reports are submitted on forms prescribed by Defendants and include a detailed breakdown and departmental allocation of costs and revenues of Lakeshore and Riveredge.

(b) The Secretary has contracted with BCA to review and audit provider cost reports and to determine the Medicare reimbursement owing to providers. In carrying out its assigned functions, BCA has, in turn, delegated a portion of its fiscal intermediary duties to HCSC as local representative of BCA. BCA and HCSC have acquired and maintain possession of the

Cost Reports filed by providers, including Lakeshore and Riveredge.

(c) BCA and HCSC also issue and keep copies of "Notices of Program Reimbursement" ("NPR's") which inform providers of the amount of Medicare reimbursement calculated to have been payable to a provider for a cost reporting period. Neither the Cost Reports nor the NPR's of Lakeshore and Riveredge are presently available except as needed by Defendants' agents and employees for purposes of administering the Medicare program. Nor is much of the information contained in those documents otherwise available.

(d) On or about August 10, 1977, BCA and HSCS formally notified Lakeshore and Riveredge of their intent to disclose the information contained in those hospitals' Cost Reports for the fiscal year ended December 31, 1976, to R. Jack Chase, the Administrator of HCSC's Blue Cross Reimbursment Department, the department of HCSC responsible for auditing and reimbursing member hospitals under HCSC's private insurance programs. No provision was made (1) to protect the confidentiality of the trade secrets, financial data and commercial information contained in the Cost Reports and NPR's, (2) to restrict the use of the information contained therein, or (3) to protect Plaintiffs' competitive position.

2.3 *The Plaintiffs' Medical Cost Reports.*

(a) Disclosure of the Cost Reports would, upon analysis by the recipient, reveal confidential commercial and financial information including without limitation:

(1) information, which could be employed to calculate average hourly rates of employees (Supplemental

affidavit of Robert J. Toller, November 23, 1977, [hereinafter "Toller III"] at 3);

(2) payment rates made for certain contract services such as laundry and linen contracts (Toller III at 4);

(3) compensation levels of hospital-based physicians (Toller III at 5, Affidavit of Robert J. Toller, August 31, 1977 [hereinafter "Toller II"] at 3);

(4) statistics used for cost allocation purposes (e.g. space allocations of the various operating departments within the hospitals) (Toller III at 6);

(5) information useful in determining the average charge per unit of patient service within the various departments (Toller III at 7);

(6) reimbursement amounts for providing services to Medicare patients, potentially reflecting discounts or contractual adjustments granted to Medicare (Toller III at 7, Toller II at 4);

(7) detailed information relative to the charges and cost of providing services to patients (Toller III at 8);

(8) detailed information related to working capital and total assets employed by the hospitals in the provision of patient care services (Toller III at 9);

(9) expenses of each department, identified as to salary and non-salary costs (Toller II at 3);

(10) costs and revenues by patient service departments (Toller II at 4);

(11) bed capacity by type of service, the patient utilization of the beds identified as to Medicare and non-Medicare patients, as well as the percent of bed capacity utilized (Toller II at 5);

(12) costs of the hospitals' facilities and equipment, including acquisitions and disposals during the year (Toller II at 5);

(13) detailed financial position and operating results of each hospital (Toller II at 6);

(14) costs of support services provided by or to affiliated companies (Toller II at 6); and

(15) department costs and allocations of support services' departmental costs to patient service departments. (Toller II at 7)

(b) The Cost Reports contain financial information in a manner which is more detailed and goes into greater depth than typical financial statements of a hospital, the tax return of a proprietary hospital, or the filings of a hospital subject to the filing requirements of the Securities and Exchange Commission. (Affidavit of Allan J. Winick, November 23, 1977, at 2) The information, both of its own and in combination with other, already available information, reflects management technique, philosophy and policy which has been developed through years of experience, as well as substantial financial investments by Plaintiffs. This information could be used to the serious disadvantage and the substantial harm of the Plaintiffs, by placing the Plaintiffs at a competitive disadvantage with respect to competing hospitals, contractors dealing with the hospitals, and customers using the hospital services. Finally, the release of the cost report information would, in some cases, constitute an invasion of certain individuals' right to privacy. (Toller II at 4)

(c) the following list provides examples of some potential, competitively harmful uses that may be made of the information contained in the Cost Reports:

(1) Disclosure of the expenses of each department identified as to salary and non-salary costs, and certain information, on the aggregate, needed to calculate average hourly rates of employees in the hospitals could result in severe wage rate competition, which could have the effect of increasing costs within the hospitals and potentially within other hospitals in the area by (i) by causing hospital-wide wage rate adjustments, and (ii) increasing employee turnover. (Toller III at 3, Toller II at 2)

(2) Disclosure of the cost of contracted services to potential suppliers of these services could have the effect of substantially negating the benefit of competitive bidding and would have the effect of increasing cost to the hospitals, or at least limiting the reduction in cost to a point above which it would have been without disclosure of the Cost Reports. (Toller III at 4, Toller II at 3)

(3) Disclosure of the hospital-based physicians components of compensation related to patient care could have a similar anti-competitive and cost-increasing effect. Physicians can reasonably be expected to seek competitive compensation levels as measured by payments being made both within the hospitals and in competitive hospitals for similar services. Competing hospitals could use such information to attract physicians away from the hospitals which would necessitate, other things being equal, the hospitals paying higher compensation levels to replace physicians lured away by competing hospitals. Such information is normally a matter of confidentiality between the hospitals and the physicians and would constitute an invasion of privacy. (Toller III at 5, Toller II at 3)

(4) Disclosure of space allocations of the various operating departments within the hospitals, in conjunction with statistics reflecting revenues by departments, could indicate which departments are expanding or contracting their services. To the extent that this information causes or induces competitors to expand services concurrently with the hospitals, duplication of services would occur which would tend to increase costs. (Toller III at 6)

(5) Disclosure of the costs and revenues by patient service departments and the information necessary to calculate the average charge per unit of patient service within ancillary departments would give competing hospitals the ability to compare charge levels for similar services, which could tend to increase the over-all cost of hospital care in the area due to increased charges for services. (Toller III at 7, Toller II at 4)

(6) Disclosure of the reimbursement amounts for providing services to Medicare patients reflects the "discounts" or contractual adjustments granted to Medicare which would give other major third party payors the ability to negotiate a similar discount for their policy holders, thus resulting in a redistribution of the cost of providing hospital care. (Toller III at 7, Toller II at 4)

(7) Disclosure of the bed capacity by type of service, the patient utilization of these beds identified as to Medicare and non-Medicare patients, and the percent of bed capacity utilized, together with other financial and statistical data included within the cost report, provides insight into the earnings potential and limitations of Affiliates, which can be misleading when considered by itself and could be used to influence the trading price of Plaintiff Affiliates' stock to the disad-

vantage of actual or potential stockholders not having access to such information. (Toller II at 5)

(8) Disclosure of the cost of the hospitals' facilities and equipment, including annual acquisitions and disposals, can provide a complete history of the hospital faciliteis which can provide trend information concerning expansion or contraction of certain services. Such information could be used to the detriment of the hospitals in seeking Certificate of Need approvals. The information could also be used by persons interested in acquiring Plaintiff Affiliates to the disadvantage of uninformed stockholders. (Toller II at 5)

(9) Disclosure of the detailed financial position and operating results of each particular hospital would result in a competitive disadvantage to Affiliates, as such information is not required from similar companies by the Securities and Exchange Commission. (Toller II at 6)

(10) Disclosure of the cost of support services provided to affiliated companies would restrict Affiliates' ability to makret its management consulting services capability by detrimentally affecting its pricing negotiations. (Toller II at 6)

(11) Disclosure of the departmental costs and the allocation of support services' departments costs to patients service departments, taken together with other information available on the cost reports, could enable a knowledgeable prospective management service customer to adopt Affiliates' management techniques without using its management services. A prospective management client wishing to so act would observe, among other items (i) department costs, for comparison purposes, (ii) distribution of housekeeping services, (iii) full time employee count and staffing patterns, (iv)

space allocation, and (v) trend factors highlighting expansion or contraction or various services and departments. (Toller II at 7)

(d) The release of the confidential commercial and financial information contained in the Cost Reports would cause substantial harm to the competitive positions of Affiliated and Midwest. The threatened harm would be irreparable to the business methods and interests of the Plaintiffs, and monetary damages would be neither ascertainable, nor adequate as a remedy.

III
Conclusions of Law

3.1 *Jurisdiction and Standing.*

(a) The Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §1331, as this action arises under the Constitution and laws of the United States, and is brought against an officer of the United States in his official capacity. *Westinghouse Electric Corp. v. Schlesinger*, 542 F.2d 1190 (4th Circ. 1976), *cert. denied*, 45 U.S.L.W. 3754 (U.S. May 12, 1977); *Planning Research Corp. v. Federal Power Commission*, 555 F.2d 970, 977 (D.C. Cir. 1977). Court also has jurisdiction over the subject matter pursuant to 5 U.S.C. §522 [The Freedom of Information Act], as this action is brought to enforce the confidentiality of information exempted from disclosure under Section 552, and Defendants BCA and HCSC are parties acting as government agents or agencies. *Id.*

(b) Plaintiffs have the requisite standing to bring this action as they have shown that (i) they are within the zone of interest to be protected by 5 U.S.C. §552 (b)(4), 20 C.F.R. §401.3 and 18 U.S.C. §1905, and

42 U.S.C. §1306, (ii) they have the requisite concrete stake in the outcome of the suit which sharpens the presentation of issues, and (iii) the issue presented is capable of judicial resolution.

3.2 *Plaintiffs Have Shown a Sufficient Likelihood of Success on the Merits to Warrant a Preliminary Injunction.*

(a) An implied right of nondisclosure exists in connection with exemption (b)(4) to the Freedom of Information Act (5 U.S.C.(b)(4)). Under the Freedom of Information Act ("FOIA") (5 U.S.C. §552), information which falls within an exemption, is not subject to mandatory disclosure. 5 U.S.C. §552(b)(4) exempts from the scope of the FOIA matters that are "trade secrets and commercial or financial information obtained from a person and privileged or confidential." Commercial or financial information is "confidential" within the meaning of 5 U.S.C. §552(b)(4) if disclosure would either (i) impair the Government's ability to obtain necessary information in the future, or (ii) cause substantial harm to the competitive position of the person from whom the information was obtained. *National Parks and Conservation Association v. Morton,* 498 F.2d 765, 770 (D.C. Cir. 1974). Plaintiffs' Cost Reports and NPR's Contain trade secrets and confidential financial and commercial information within the scope of exemption (b)(4) to the FOIA (5 U.S.C. § 552(b)(4)). *Parkridge Hospital, Inc. v. Blue Cross and Blue Shield of Tennessee,* No. CIV-1-77-85 (E.D. Tenn. April 15, 1977); *Westchester General Hospital, Inc. v. Dep't of H.E.W.,* No. 77-364-Civ-J-T (S.C. Fla. June 27, 1977). An implied right of nondisclosure exists on behalf of suppliers of information, based upon the carefully delineated exemptions

to the FOIA, *Westinghouse Electric Corp. v. Schlesinger,* 542 F.2d 1190 (4th Cir. 1976) *cert. denied sub non., Brown v. Westinghouse Electric Corp.,* 97 S.Ct. 2199 (1977). Accordingly, Plaintiffs'-Cost Reports and NPR's are protected from disclosure pursuant to the right of non-disclosure implied from 5 U.S.C. §552(b)(4). *Id.*

(b) There is a reasonable probability that disclosure of Plaintiffs' Cost Reports and NPR's may be prohibited by 18 U.S.C. §1905 and 42 U.S.C. §1306. 18 U.S.C. §1905 makes it a crime for any employee of the government or any agency of the government to divulge or disclose information concerning trade secrets, operations or confidential statistical data not authorized by law. Plaintiffs' Cost Reports and NPR's were filed with Defendants pursuant to 42 U.S.C. §1395(g) and 20 C.F.R. §406, and contain information within the scope of 18 U.S.C. §1905. Likewise, 42 U.S.C. §1306(a) prohibits, under criminal penalties, the disclosure of such information obtained by the Secretary, except as prescribed by regulation. The only law or regulation purporting to authorize the disclosure of the Cost Reports and NPR's is 20 C.F.R. §422.435.

(c) Application of 20 C.F.R. §422.435 to permit disclosure of Plaintiffs' Cost Reports and NPR's is in excess of statutory authority, and the regulation, as applied, is invalid. (5 U.S.C. §706) The promulgation of the regulation purportedly relied upon the authority granted by the FOIA, not the provision of 42 U.S.C. §1306. (20 C.F.R. §422.401) The FOIA does not apply to information coming within an exemption to the disclosure requirements, and the regulation cannot be supported by additional, *post hoc,* asserted statutory authorization. *Burlington Truck Lines v. Uni-*

ted States, 371 U.S. 156, 158, 83 S. Ct. 239 (1962); *SEC v. Chenery Corp.*, 318 U.S. 80, 63 S. Ct. 454 (1943). Moreover, Defendants have not shown that 42 U.S.C. §1306 can be construed to provide authority for promulgation of 20 C.F.R. §422.435.

(d) The threatened disclosure of the Cost Reports and NPR's pursuant to 20 C.F.R. §422.435 may constitute an abuse of agency discretion. (5 U.S.C. §706) There is a reasonable probability that the Cost Reports and NPR's contain information within the scope of 18 U.S.C. §1905. 20 C.F.R. §422.435 purporting to authorize the disclosure of the Cost reports and NPR's, may therefore be invalid as a *per se* abuse of discretion, as the regulation would be in direct contravention of 18 U.S.C. §1905. *Charles River Park "A", Inc. v. Dep't of H.U.D.*, 519 F.2d 935, 943 (D.C. Cir. 1975) Moreover, assuming *arguendo* that 18 U.S.C. §1905 does not apply to this case, Plaintiffs' interests in preserving the confidentiality of their trade secrets and financial and commercial information in order to prevent substantial harm to their competitive positions outweigh the governmental and public interests in disclosure of the requested information. *Charles River Park "A", Inc. v. Dep't of H.U.D., supra; Eq.; Parkridge Hospital, Inc. v. Blue Cross and Blue Shield of Tennessee, supra,* and *Westchester General Hospital Inc. v. Dep't of H.E.W., supra.*

(e) 20 C.F.R. §422.435 is inconsistent with regulations the Secretary has designated as controlling and is invalid. The regulations prescribed by the Secretary concerning the availability and disclosure of information are found at 20 C.F.R. §401.3 and 20 C.F.R. §422.401 *et seq.* As expressly stated, the regulations set forth in 20 C.F.R. §422.401, *et seq.* including 20 C.F.R.

§422.435, were not intended to "revoke, modify or supercede the regulations of the Social Security Administration relating to disclosure of information" set forth in Part 401 of Title 20. Those regulations, in turn, contemplate the protection of confidential information, and 20 C.F.R. §401.3, now in effect does not contemplate disclosure where such action would be prohibited by statute or where disclosure is not in the public interest and "consistent with obligations of confidentiality and administrative necessity" recognized by the Act. (20 C.F.R. §401.3(b)(2); See 45 C.F.R. §§5.11, 5.12, 5.70 and 5.71) The threatened disclosure of Plaintiffs' Cost Reports and NPR's pursuant to 20 C.F.R. §422.435 is inconsistent with the Secretary's recognized obligations of confidentiality and administrative necessity. Therefore, 20 C.F.R. §422.435 is inconsistent with the terms of controlling regulations and is invalid and without the force and effect of law.

3.3 *Plaintiffs Have Shown a Likelihood of Irreparable Harm to Plaintiffs Which Outweighs Any Potential Harm to Defendants.*

(a) The information which is either explicitly stated in or deducible from Plaintiffs' Cost Reports and NPR's would, if obtained by a competitor, facilitate personnel raiding, takeover efforts, unfair bargaining practices, selective pricing of patient services, and expansion planning. Disclosure of the requested information would cause substantial harm to Plaintiffs' competitive position. *Parkridge Hospital Inc. v. Blue Cross and Blue Shield of Tennessee, et al.; supra, McCoy v. Weinberger,* 386 F.Supp. 504, 507 (W.D. Ky. 1974).

(b) The confidential commercial and financial nature of the documents sought to be released establishes

the irreparable harm which will result. Once these confidential reports are released, they may never be recalled, and they will have become a part of the public domain available to anyone wishing to know about Plaintiffs' business operations or other confidential aspects of Plaintiffs' business activity. *Westchester General Hospital, Inc. v. Dep't. of H.E.W., supra.*

(c) There does not appear to be any threatened harm to Defendants from the grant of injunctive relief to protect the confidentiality of Plaintiffs' Cost Reports and NPR's.

3.4 *Plaintiffs Have Shown that They are Without Adequate Remedy at Law.* Money damages do not appear to be an adequate remedy. The nature and degree of harm that would be done to Plaintiffs' competitive position in the relevant market by disclosure of information pertaining to their operations is immeasurable and therefore incompensable. Since Plaintiffs could neither be restored to the status quo existing before such disclosure, nor adequately compensated, the substantial harm that they would suffer from disclosure of the confidential data would be irreparable. *Id.*

3.5 *Injunctive Relief Is Not Against The Public Interest.*

(a) The public interest in full disclosure and free access to information collected by the government is not unlimited, and the protection of highly confidential information is recognized by common law, statute and the Secretary's own regulations. Preservation of the confidentiality of information entrusted to the government is also essential to the operation of the governmental programs administered by the Secretary. Injunctive relief in this case serves those interests without

impairing any substantial public interest in access to information.

(b) The public interest is also served by preventing the disclosure of information where such disclosure could have anti-competitive effects, deter innovative business techniques in hospital management, as well as participation in governmental programs, such as Medicare, and possibly contribute to further increased costs of medical care delivery.

3.6 *Plaintiffs Are Entitled to Preliminary Injunction.* Accordingly, a preliminary injunction is hereby issued enjoining the Defendants and each of them and their officers, agents, attorneys, representatives and members and all persons acting in and or in conjunction therewith from making Plaintiffs' Cost Reports and NPR's available to Defendant HCSC's Blue Cross Reimbursement Department or to any other person or corporation for any purpose not inextricably tied to the Medicare Program pending determination of Plaintiffs' request for permanent injunction.

ENTERED:

/s/ (Illegible)
United States District Judge

DATED: January 30, 1978.

APPENDIX C.

Order.

In the United States District Court, for the Eastern District of Virginia, Alexandria Division.

Circle Terrace Hospital Corporation, Plaintiff v. Group Hospitalization, Inc., et al., Defendants. Civil Action No. 77-487-A.

The question before the Court in this case is whether certain reports submitted by Circle Terrace to the defendants fall within the (b)(4) exemption of the Freedom of Information Act, 5 U.S.C. § 552(b)(4).

The plaintiff claims these reports contain privileged and/or confidential commercial or financial information —That there is keen competition between hospitals in the Northern Virginia-District of Columbia area over patients, physicians and professional employees and that the information contained in these reports is virtually a financial blueprint of Circle Terrace and is much more detailed than its tax returns.

The Government admits that it gives these reports to anybody who asks for them.

Although neither side elected to call any outside expert as was done in the Westinghouse, General Motors and U. S. Steel cases, it is rather clear from an examination of the documents in question that much of the information therein contained would not be available to a competitor from other sources and would cause substantial harm to the competitive position of the person from whom the information was obtained.

The Court of Appeals for the Fourth Circuit, in Westinghouse v. Schlesinger, 542 F.2d 1190 (1976), sets forth the law in this circuit as follows:

> ". . . The protection from disclosure from such information by Exemption 4 [was granted] . . . not only as a matter of fairness, but as a matter of right. . . . [The exemption] represented an express affirmation of a legislative policy favoring confidentiality of private information furnished government agencies, the disclosure of which might be harmful to private interests. It was manifestly intended to protect that private interest."

Therefore the Court finds that these cost reports fall within the § 552(b)(4) exemption and may not be disclosed to the general public by the Secretary. This is not to say, however, that the Secretary may not use the information contained in these reports in questioning or reporting the money that was paid to Circle Terrace for Medicare and/or Medicaid hospitalization, if he be so advised, and

It Is So Ordered.

The Clerk will send a copy of this order to all counsel of record.

September 6, 1977

/s/ ILLEGIBLE
United States Senior District Judge

Service of the within and receipt of a copy thereof is hereby admitted this ..... day of August, A.D. 1978.

MOTION FILED
DEC 26 1978

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-922

CHRYSLER CORPORATION, *Petitioner,*

v.

HAROLD BROWN, ET AL., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF and SUPPLEMENTAL BRIEF

BURT A. BRAVERMAN
FRANCES CHETWYND
COLE, ZYLSTRA & RAYWID
2011 Eye Street, N.W.
Washington, D.C. 20006

HIRA ANDERSON
P.O. Box 1919
Detroit, Michigan 48288

Attorneys for Petitioner Chrysler Corporation

December 26, 1978

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-922

CHRYSLER CORPORATION, *Petitioner,*

v.

HAROLD BROWN, ET AL., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF

Pursuant to Rule 41(5) and (6) of the Rules of this Court, Petitioner Chrysler Corporation hereby moves for leave to file a supplemental brief in this case.

1. Certiorari was granted in this case on March 6, 1978. All briefs have been filed by the parties, and the case was argued orally on November 8, 1978. Consequently, under Rule 41(5) and (6), a supplemental brief can be filed only by leave of Court.

2. On October 18, 1978, the United States District Court for the District of New Jersey issued a decision in *W. L. Wearly*

v. FTC, Civil No. 77-1860 (D.N.J., October 18, 1978), which, as described in the accompanying supplemental brief, relates directly to an issue raised in Petitioner's briefs and by Petitioner and the Court during oral argument. Because this opinion has not yet been reported and only recently came to the attention of counsel for Petitioner, it was not possible to address this decision in Petitioner's opening or reply brief or during oral argument. Consequently, Petitioner seeks leave to file a supplemental brief for the purposes of bringing the *Wearly* decision to the Court's attention and, for the Court's convenience, furnishing a copy of that opinion to the Court.

3. Respondents do not object to the filing of a supplemental brief by Petitioner.

Wherefore, for the foregoing reasons, Petitioner respectfully moves this Court for leave to file a supplemental brief.

Respectfully submitted.

BURT A. BRAVERMAN
FRANCES CHETWYND
COLE, ZYLSTRA & RAYWID
2011 Eye Street, N.W.
Washington, D.C. 20006

HIRA ANDERSON
P.O. Box 1919
Detroit, Michigan 48288

Attorneys for Petitioner
Chrysler Corporation

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-922

CHRYSLER CORPORATION, *Petitioner*,

v.

HAROLD BROWN, ET AL., *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

SUPPLEMENTAL BRIEF

This case is a "reverse-FOIA" action in which Petitioner has challenged the power of several federal agencies to publicly disclose pursuant to the Freedom of Information Act, 5 U.S.C. §552, confidential business information and documents which Petitioner has furnished to those agencies. In its opening brief (p. 24 n. 26) and its reply brief (pp. 4-8 and n. 9), as well as in the lower courts (see, *e.g.*, Pet. App. 41a), Petitioner urged that the disclosure of its documents, which contain confidential

business information and trade secrets, would impair and perhaps destroy the intellectual property contained in those documents and, thereby, constitute a taking of property in contravention of the Fifth Amendment to the Constitution of the United States. This issue was also raised by Petitioner during oral argument and was a matter of apparent concern to the Court, as reflected by questions posed by the Court during argument.

On October 18, 1978, the United States District Court for the District of New Jersey issued its decision in *W. L. Wearly v. FTC*, Civil No. 77-1860, where the court held, *inter alia*, that the plaintiff need not produce certain confidential business information to the FTC in response to an administrative subpoena unless the agency guaranteed that the information would not subsequently be disclosed publicly pursuant to the Freedom of Information Act. In reaching that result, the district court reasoned that disclosure of trade secrets and confidential business information under the FOIA to members of the public would constitute a taking of property for private purposes without compensation, in violation of the Fifth Amendment to the Constitution of the United States.

The *Wearly* decision contains a comprehensive analysis of the sensitive question of whether public disclosure of confidential business information under the Freedom of Information Act runs afoul of the Constitutional guarantee against the taking of private property. Because this issue has been raised by Petitioner and is obviously of concern to the Court, Petitioner believes that the Court may want to consider the analysis conducted, and conclusions drawn, by the district court in *Wearly*. Accordingly, Petitioner has moved for leave to file this supplemental brief for the purposes of bringing that case to the

Court's attention and of submitting to the Court the attached copy of the *Wearly* decision, which is as yet unreported.

Respectfully submitted,

BURT A. BRAVERMAN
FRANCES CHETWYND
COLE, ZYLSTRA & RAYWID
2011 Eye Street, N.W.
Washington, D.C. 20006

HIRA ANDERSON
P. O. Box 1919
Detroit, Michigan 48288

Attorneys for Petitioner
Chrysler Corporation

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Civil No. 77-1860 (VPB)

W. L. WEARLY, et als., *Plaintiffs,*

vs.

FEDERAL TRADE COMMISSION, et als., *Defendants.*

OPINION

BIUNNO, District Judge.

This litigation grows out of an administrative subpoena issued to Wearly, who is chairman of Ingersoll-Rand (I-R), which in turn owns all the stock of its subsidiary, Torrington. The subpoena was issued in connection with a non-public investigation designed to look into the question of anti-trust aspects of activities or arrangements conducted through joint ventures, stock acquisitions, and the like. The specific subject matter deals with "needle roller bearings" (NRB) and "loose needle rollers" (LNR).

As everyone knows, there are many kinds of bearings for axles and shafts. The earliest form is the common journal, going back to the wheelbarrow and the wagon. The wheel is of immense value for the physical reason that rolling friction is much lower than sliding friction under most conditions, and since friction causes waste of energy, its reduction increases the efficiency of machines to do useful work.

Even with the development of Babbitt metal for journals, however, sliding friction remained between the shaft and the simple journals. The first important improvement, growing out of technological advances in metallurgy, was the ballbearing. Set between two "races" of hardened steel, the smooth, round and hard steel balls made it possible to substitute rolling friction between shaft and journal.

It will be recalled that at the start of World War II, the nation's railroads had just begun the process of replacing the simple journal box on freight cars with roller bearings, to eliminate breakdowns from "hot boxes" and sharply reduce maintenance.

After the ball bearing, there came roller bearings, tapered and double tapered roller bearings, thrust bearings, and eventually the needle roller bearing. Each of these forms of bearing are variations of the basic concept of substituting rolling friction for sliding friction. Each form is designed to deal with the wide range of loads and stresses encountered in all kinds of machines that have rotating axles or shafts. The list of applications is no doubt enormous, ranging from the bicycle, through the many devices with shafts in automobiles, refrigerators, washing machines, oil burners, attic fans, and other appliances, through manufacturing equipment such as turret lathes and milling machines, to sophisticated gyroscropes for space craft with rotational speeds of 10,000 r.p.m. or more.

The defendants, who are the Federal Trade Commission and its members, issued the subpoena involved not to I-R or Torrington, but to Mr. Wearly, chairman of I-R. Since the non-public investigation is directed to corporate activity, the reason for addressing Mr. Wearly is obscure. Various responses at the hearings suggest that the reason is "strategic", whatever that may mean, but the only difference the court has been able to discern is that an individual who is subpoenaed and who resists the command after a judicial enforcement order is subject to the peril or jeopardy of imprisonment, which the corporation is not. Thus, the use of an individual subpoena is particularly strange

in a case like this, where the subpoena is "duces tecum", and the main object is to obtain specified categories of documents, and where the agency has made clear that it will accept the documents by mail along with a verifying affidavit, as compliance with the subpoena without the personal appearance of the witness being required. This practice for non-public investigations is essentially the same as the Grand Jury subpoena for corporate records. Such subpoenas are routinely satisfied through arrangements with the U.S. Attorney to turn over to him the requested documents without any witness appearing before the Grand Jury.

After the subpoena was issued and served, conferences followed. Such conferences are also commonplace and routine. Their object is to arrive at a clearer and sharper definition of the classes of documents called for. It is fairly usual for the subpoena duces tecum to have attached a list of categories of documents on a "boiler plate" format, that either does not match the particular records of the enterprise, or else calls for types of documents of such massive bulk and number as to be essentially useless to the agency and unreasonably burdensome on the supplier.

For most categories, these matters were resolved by negotiations, and as to those the court understands that the documents have been supplied.

The controversy here involves a number of categories of documents which, for lack of a better term, the court has chosen to describe as documents containing "proprietary information". This information includes not only trade secrets, secret processes and secret devices, but also a great mass of management data, evaluations, plans, production and production results of a kind that traditionally and historically is never disclosed outside the company, except on protected and privileged conditions usually established by contract, nor even within the company except to those persons who have a "need to know" the information in order to execute their functions.

In respect to these, an irresolvable impasse was reached. The position of plaintiffs was basically two-fold: one claim was that the request was unreasonable, excessive and beyond authority; the other was that defendants were either unable or unwilling to provide adequate security protection if the data were disclosed, or, if they did, that such arrangements could not be relied on.

The controversy is real, and it is specific. It is plaintiffs' position that this proprietary information is absolutely vital and essential to its ability successfully to compete in the marketplace with all competitors, domestic and foreign, the largest world-wide competitor probably being SKF of Sweden. They assert that this is the kind of information which, in the shrouded world of industrial espionage, is precisely the kind that competitors would give their eye teeth for. If they must give it to FTC for the purposes of the non-public investigation, they will do so with the utmost reluctance and with their "heels dug in". But, even then, they are unwilling to provide it unless effective means are provided to assure that the integrity and safety of the information will be fully protected against disclosure to competitors, either directly or by public dissemination. It is on this aspect that the controversy mainly centers.

Proprietary information, of course, is but one form of intangible personalty; in the same general category as stocks, bonds, mortgages, copyrights, letters patent, and the like. The major characteristic that distinguishes proprietary information from such other forms is that while the disclosure of A's ownership of a particular security in no way affects his ownership thereof or his rights therein, the disclosure of the tenor and content of proprietary information destroys its value as well as the property interest in it. The value resides not in the pieces of paper on which the information is recorded, but in the information itself. Once that information becomes public, the property aspect is gone.

The law in regard to proprietary information, although well known and generally recognized, seems not to have been

treated in any comprehensive way, and the decisions reflect indirect aspects depending on the context in which disputes happen to arise. In part, this may be due to the awareness of owners of proprietary information to adopt and follow careful practices to prevent disclosures.

Some decisions arise out of the conduct of a former employee who attempts to use the proprietary information for the benefit of himself and a competitor. Others involve conduct by competitors who manage to obtain the information by unequitable, unfair, or improper means. Decisions of these kinds are generally equity cases where, if the showing for relief be made, the traditional remedy is that of injunction. This is for the obvious reason that money damages are usually incapable of ascertainment, and so the damage is "irreparable" in that form.

A few cases deal with the question whether a secret process is "property" within the meaning of corporation laws requiring that capital stock of a corporation must be paid for in money or "property". See, e.g., *Durand v. Brown*, 236 F.609 (CA-6, 1916). For a comprehensive discussion of the same question involving the issuance of stock in exchange for patents, a closely related question, see *Atlantic Trailers, etc. v. McCallum*, 118 Tex. 173, 12 SW2d 957 (1929).

In practical experience, the question arises most frequently, and quite frequently, in the context of the law of evidence. The "trade secret" privilege is well-established at common law and is regularly applied in the federal courts. However, the matter arises at the trial level, as an evidence issue collateral to almost any kind of case, and is routinely dealt with at that level with relatively little recording in the reports.

There can be no real doubt that the trade secret privilege, as a rule of evidence, is grounded on the property nature of the trade secret and that it recognizes the fact that disclosure of the tenor and content destroys both the value and the property. In balancing the need for evidence against the property right, the

well-recognized concept is that the privilege is a qualified one in the sense that disclosure will be required (so that the evidence may be available) but under the control of a protective order (to the end that the property not be "taken").

See, for example, F.R.Civ.P.2d(c), for one formulation. The sense of this rule is so well understood, and so regularly applied, that competent counsel have no difficulty, in most cases, in preparing a suitable protective order for entry by consent.

When it adopted the Federal Rules of Evidence, by Pub L. 93-595, 88 Stat. 1926, the Congress was wholly unable to come to agreement on any of the proposed privilege rules. In the rules prescribed by the Supreme Court on November 20, 1972, there were specific privilege rules, among which was Rule 508 dealing with trade secrets. The tenor of that rule follows the recognized characteristics without noticeable change. The key sentence said:

> "When disclosure is directed, the judge shall take such protective measure as the interests of the holder of the privilege and of the parties and the furtherance of justice may require."

The House and Senate and Conference Committee reports disclose that this rule did not give rise to any problem. Rather, sharply differing views in regard to the inclusion of a newsperson's "shield" law, and the scope of the privileges for "Secret of State" and "Official Information" were not capable of resolution, and instead of adopting any specific privilege rules, the Congress enacted a general rule, Fed. Ev. Rule 501, which calls for application of "the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience".

For the purposes of the present controversy, the court is satisfied, and finds, that the formulation of proposed Rule 508 adequately reflects the principles of the common law in the sense required by Fed. Ev. Rule 501.

The enactment of evidence rules by the Congress was the federal culmination of an effort first reflected by the adoption of the Model Code of Evidence by the American Law Institute in 1942. That formulation was the result of a prolonged study, for which Edmund M. Morgan was Reporter, John M. Maguire was Assistant Reporter, and John H. Wigmore was Chief Consultant. In turn, the Model Code was followed by the Uniform Rules of Evidence drafted by a committee of the National Conference of Commissioners on Uniform Laws, approved in 1953 by the Conference and by the House of Delegates of the American Bar Association, as well as by the American Law Institute the following year.

The Uniform Rules draft formed the basis for a report of May 25, 1955 by a committee of the Supreme Court of New Jersey, headed by Mr. Justice Nathan L. Jacobs, and which included other distinguished members such as the late Mr. Chief Justice Joseph Weintraub, former Mr. Justice Frederick W. Hall, former Superior Court Judge Alfred C. Clapp, and Professor Lewis Tyree. With various modifications, that committee proposed adoption of the Uniform Rules for New Jersey.

For reasons arising under the New Jersey Constitution, 1947 which need not be detailed here, the New Jersey Legislature established a Commission on the subject by J.R. 15, 1955, headed by the late Superior Court Judge John O. Bigelow. The report of that Commission, dated November, 1956, concluded that the rules be adopted by statute, rather than by the court. In 1960, the issue was resolved by enactment of The Evidence Act, 1960, NJPL 1960, ch. 52. That law enacted the rules on definitions (N.J.S. 2A:84A-1 through 15), a section on Scope of the Rules (N.J.S. 2A:84A-16), and the rules on privilege (NJS 2A:84A-17 to 32). For the balance of the rules, a mechanism was established, modelled on 28 USC §2072, for the promulgation by the Supreme Court of New Jersey and filing with the Legislature and Governor, who could act by joint resolution. The remaining rules took effect September 11, 1967 as promulgated by the Supreme Court and pursuant to JR-5, 1967.

The significance of this brief history in respect to the present controversy is twofold. One, the New Jersey Legislature regarded rules of privilege to be so infused with policy considerations wholly independent of the judicial process of adducing evidence that it undertook to enact the privilege rules itself. Two, in establishing the scope of the rules, it directed that:

> "Rule 2(1). The provisions of Article II (Chapter V of the Rules), Privileges, shall apply in all cases and all proceedings, places and inquiries, whether formal, informal, public or private, as well as to all branches of government and by whomsoever the same may be conducted, and none of said provisions shall be subject to being relaxed." N.J.S. 2A:84A-16.

This scope rule, which derived from the Report of the Bigelow Commission, made the privilege rules applicable everywhere, including any kind of proceeding before administrative agencies. As noted in the Comment to Rule 2 in that Report:

> " *** The Rules governing privileges, however, apply in all cases and all proceedings".

The rationale for this view is obvious: if a communication or other kind of information is to be privileged from disclosure for some policy reason unrelated to the taking of evidence, it should be privileged everywhere, not merely in court proceedings. Long established rules of privilege, such as the attorney-client privilege, the marital privilege, or the trade secret privilege, would be meaningless if protected in a lawsuit before a court, but required to be disclosed in a proceeding before a zoning board of adjustment or any other administrative agency.

While the Congress took the same view as did the New Jersey Legislature in respect to the source of authority to adopt rules of evidence, regarding them as substantive rather than procedural (See H.R. 93-650; S.R. 93-1277), its own scope

rule, Fed. Ev. Rule 1101, made the enactment applicable to courts but failed to deal with administrative agencies.

Despite this, it is clear that recognized privileges protecting against disclosure must be applied everywhere if they are to have meaning. When a client communicates with his attorney, he cannot possibly forecast the setting in which he or his attorney may be asked to disclose the communication. The purpose of that privilege is to assure the availability of counsel's advice, the soundness of which depends on full disclosure to counsel. Confidence is essential to the relation. The privilege cannot be made to depend on whether the question is asked in court, or by an administrative agency, or by a Congressional committee.

This is even more emphatically true of the trade secret privilege, grounded as it is on the property interest in the content of the information. Here, constitutional considerations are involved. The sovereign power of eminent domain to take property is inherent in sovereignty. But by Amendment 5 of the Constitution, it may be exercised for public use only upon just compensation. It may not be exercised for private use at all.

Thus, it is plain that any failure to recognize and honor the privilege, and to furnish full and adequate protection against the kind of disclosure that would destroy the property interest in applying the balancing test in instances when restricted disclosure is called for in order to conduct a proceeding, would involve constitutional problems of considerable magnitude. This is for the reason that disclosure is required by act of the government, acting through any of its branches. Amendment 5 applies to all the branches, and all agencies and officers of government.

In some cases, no doubt, the need for the information is lacking in sufficient importance to warrant that the trade secret be disclosed at all. In those cases, the matter involved can be resolved fairly and adequately without disclosure. In other cases, whatever is involved cannot reasonably be resolved

without disclosure; in those cases, the requirement to disclose is justified by strictly limiting dissemination of the information. This serves the needs of the proceedings and protects the property interest. It amounts to a disclosure under conditions that are themselves privileged.

The concept is well recognized. A good illustration is found in N.J.Ev. Rule 37 (N.J.S. 2A:84A-29), dealing with waiver of a privilege. The second paragraph reads:

> "A disclosure which is itself privileged or otherwise protected by the common law, statutes or rules of court of this State, or by lawful contract, shall not constitute a waiver under this section."

Thus, the owner of a trade secret who discloses it in confidence to his attorney does not waive his trade secret privilege because the disclosure is itself a privileged communication.

So also, the highly confidential data about plant efficiency, production plans, estimates of customer needs, and the like, are commonly disclosed to banks and other financial institutions so that they may pass on loan programs, but only under express or implied obligations not to disclose the information. The owner of a trade secret or secret process may license another to use it, but, if well advised, will require covenants against disclosure.

This characteristic of making disclosure of proprietary information under privileged conditions arising out of contract has been recognized by the Supreme Court. In *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470 (1974), the Chief Justice said:

> "This necessary element of secrecy is not lost, however, if the holder of the trade secret reveals the trade secret to another 'in confidence, and under an implied obligation not to use or disclose it.' *** These others may include those of the holder's 'employees to whom it is necessary to confide it, in order to apply it to the uses for which it is intended.' *** Often the recipient of confidential knowledge of the subject of a trade secret is a licensee of its holder. *** The protection accorded the trade secret holder is against the disclosure or unauthorized use of the trade secret by those to whom the secret has been confided under the express or implied restriction of nondisclosure or nonuse. The law also protects the holder of a trade secret against disclosure or use where the knowledge is gained, not by the owner's volition, but by some 'improper means', Restatement of Torts, §757(a), which may include theft, wiretapping, or even aerial reconnaisance. A trade secret, however, does not afford protection against discovery by fair and honest means, such as by independent invention, accidental disclosure, or by so-called reverse engineering, that is by starting with the known product and working backward to divine the process which aided in its development or manufacture." 416 U.S., at 475-476 (citations and footnotes omitted).

The court sees no reason why these fundamental principles, which are hornbook law, should not be applied when the disclosure is not voluntary, but is by compulsion of a subpoena issued by any branch of government, and usually enforced by the judiciary.

Failure to provide adequate protection to assure confidentiality, when disclosure is compelled by the government, amounts to an unconstitutional "taking" of property by destroying it, or by exposing it to the risk of destruction by public disclosure or by disclosure to competitors. The constitutional limitation cannot be altered by any branch of government.

The concept of protection for mandatory disclosure of privileged matter finds expression in other laws. Thus, the constitutional right not to be compelled to testify when the testimony may tend to incriminate the witness, has also been made the subject of a balancing test. Under 18 USC §6001, et seq., if the government is of the view that it is more important

to have the testimony of a witness than it is to prosecute him for what that testimony may reveal, directly or indirectly, it may decide to give up any right to prosecute on the basis of the testimony or information sought from the witness, and obtain a court order directing the witness to testify notwithstanding the right not to self-incriminate.

Similarly, under the Jencks Act, 18 USC §3500, if the government elects not to comply with a court order to provide the defense with a "statement", as there defined, for cross-examination, the court may strike the testimony of the government witness or declare a mistrial. In cases where the testimony is essential to make a case, the government's election not to disclose can result in dismissal of the indictment.

Under the laws governing patents and copyrights, Congress requires disclosure of the invention, or a filing of the copyright material as a consideration for "securing for limited times to authors and inventors the exclusive right in their respective writings and discoveries," U.S. Const., Art. 1, §8, par. 8.

In all these instances, which are merely illustrations familiar to all, there is a *quid pro quo* of sufficient substance to balance the interests. So, also, compelled disclosures of proprietary information require a balancing *quid pro quo*. Because of the unique nature of the property, which exists only so long as there is only a disclosure that is itself privileged, the only suitable *quid pro quo* is an arrangement, tailored to the particular case, that insures against accidental, or unauthorized, or improper disclosure.

It must be emphasized that, in the context of this case, the issue does not involve the question of deprivation of property "without due process of law", nor the question of taking private property for public use "without just compensation", these being the two explicit provisions of Amendment 5 in respect to property. Rather, the question relates to the "taking" of private property at all, when the taking is not for public use but for

private use. This prohibition is implicit rather than express, since it would be an insult to every notion that government may take property for public use only with just compensation, and yet be allowed to take private property for private use without any protection or compensation at all.

Nearly a century ago, it was decided that when private property is taken for public use without compensation, the federal courts may take jurisdiction of an action by the owners in ejectment against the agents of government to establish their rightful title, even though there be no statutory remedy, or an imperfect statutory remedy, for obtaining just compensation. See *U.S. v. Lee*, 106 U.S. 220 (1882), which ruled that the heirs of General Lee were the rightful owners of what is now the Arlington National Cemetery, and (more to the point here) that the provisions of Amendment 5 *were intended to be enforced by the judiciary.*

U.S. v. Lynah, 188 U.S. 445 (1903), established the rule that the flooding of lands bordering a system of dams and walls across a river was a "taking" of property for which a judicial action and remedy would be provided even though the Congress did not specifically direct that the property be taken, and even though there had been no formal proceedings to condemn the land.

Jacobs v. U.S., 290 U.S. 13 (1933) ruled that even though condemnation proceedings are not instituted, the owner of lands may assert his claim for compensation in his own action. As Chief Justice Hughes observed there:

> "That right was guaranteed by the Constitution. The fact that condemnation proceedings were not instituted and that the right was asserted in suits by the owners did not change the essential nature of the claim. *The form of the remedy did not qualify the right. It rested upon the Fifth Amendment. Statutory recognition was not necessary.* Such a promise was implied because of

> the duty imposed by the Amendment. The suits were thus founded upon the Constitution of the United States." (290 US at 16) (Emphasis added).

The *Lee* case is among the precedents relied on to support the action and the claim made in *Bivens v. Six Unknown Agents*, 403 U.S. 388, at 394, 395 (1971).

The present case differs only in the respect that since there cannot be any "taking" for private use, and since the "taking" of the kind of property here involved, without authority in law, is "irreparable" in the sense of money damages, the remedy sought is different. The remedy sought is a declaration that the threatened "taking" is wrongful, and if that point be established, to prevent the unlawful taking.

It is well known that this kind of question is not dealt with in the precedents, because traditionally the trade secret privilege has been recognized and honored, not only in the courts but also in the other two branches of government. It is only since the enactment of the Freedom of Information Act, 5 USC §552, as amended, that the problem has arisen. Through that law, anyone may ask for copies of documents which are among the records of the countless agencies in the Executive Branch, by merely paying the rate for making copies and without any showing of standing, legitimate interest or any other threshhold requirement. Documents (that is, the information they contain) furnished under that law are automatically in the public domain, and to the extent that what is furnished amounts to proprietary information, the supplying of it obviously amounts to a "taking" by destruction of the privilege, and the taking is for the use of the private requester, thus making the process one of taking private property for private use. This is the root of the threat and of the risk in this case, for if the proprietary information be turned over to defendants without appropriate protection and assurance of protection *in advance*, the risk of loss by improper taking is necessarily a considerable risk.

In their note to proposed Fed. Ev. Rule 508, the distinguished Advisory Committee observed:

> "While sometimes said not to be a true privilege, a qualified right to protection against disclosure of trade secrets has found ample recognition, and, indeed, a denial of it would be difficult to defend. * * * Congressional policy is reflected in the Securities Exchange Act of 1934 * * * and the Public Utility Holding Company of 1933 * * *, which deny the Security and Exchange Commission authority to require disclosure of trade secrets and processes in applications and reports."

Despite the express provision in the Federal Trade Commission Act, 15 USC §46 (f), denying the Commission the authority to make public "trade secrets and names of customers", and despite the provision in the Freedom of Information Act, 5 USC §552 (b) (3) and (b) (4), that

> "(b) This section [act] does not apply to matters that are:
>
> . . .
>
> "(3) specifically exempted from disclosure by statute;
>
> "(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;"

there is still a live, active and sharply contested controversy here. One reason, among others, is that 5 USC. §552 (c) says that: "This section is not authority to withhold information from Congress."

At least since *Tobin v. U.S.*, 306 F.2d 270 (CA-DC, 1961), *cert. den.* 371 U.S. 902 (1962), and through *U.S. v. Fort*, 443 F.2d 670, at 677-278 (CA-DC, 1970), *cert. den.* 403 U.S. 932 (1971), the courts have been urging the Congress to deal with the problem of claims of privilege, particularly in the extremely delicate setting of a Congressional subpoena. The problem is

highlighted by *U.S. v. A.T.&T.*, 551 F.2d 384 (CA-DC, 1976), in which the Department of Justice (in the Executive Branch) sought relief from the courts to prevent disclosure by a witness (AT&T) of information involving national security wiretaps under a subpoena by a subcommittee of the House of Representatives. The opinion is highly educational.

Congress is not unaware of the problem. In Senate Report No. 95-170, to accompany S. 555 (95th Congress, 1st Session) the need for some rational resolution of this aspect of the problem is recognized, especially at pp. 16-21. At this writing, whether any action was taken before the *sine die* adjournment of October 14-15, 1978 is not yet known.

There are other specific statutes involving regulatory agencies, enacted *after* the Freedom of Information Act, in which the Congress has explicitly stated that proprietary information is not to be disclosed, yet these, too, are the subject of litigation in District Courts throughout the country, one of them now pending here, in which the ruling has been delayed so that the court may consider the effect, or the applicability, of amendments enacted within the last month.

Although this court does not claim to have searched all the statutes comprehensively, it is informed that there are at least 80 statutory sections, from Title 2 USC to Title 49 USC, which employ the term "trade secrets". There are said to be more than 20 decisions of the Supreme Court of the United States, alone, in the period from 1944 to 1977 that deal with the term in some fashion. This is a massive literature in primary authority which reflects the wide recognition of the term and the concept it represents.

With the foregoing as an analytical context, it is possible to turn to specific issues in this case. There is no need to repeat here the jurisdictional basis set out at the time the court ruled on the application for preliminary injunction. The determination there made is fortified by the decisions in *Lee, Jacobs* and *Bivens*, mentioned above.

That declaratory judgment relief is proper can hardly be disputed. The existence of a genuine controversy between specific parties, over issues that mainly involve questions of law going to their respective rights, duties and legal relations, and depending on the construction of Constitution and statutes, is clear.

It is also clear beyond argument that defendants lack even a rule or regulation governing the subject at the non-public investigation stage, and that the proposed regulation, 43 Fed. Reg. 3571 (January 26, 1978) is woefully inadequate for the protection of private property.

It will not do to say that the agency, under ordinary principles, should first have the proprietary information submitted pursuant to its subpoena, and that it will entertain a request for a letter for confidential treatment. This will not do for several reasons. One is that the owner of proprietary information should never make a disclosure of its content, either voluntary or involuntary without enforceable restrictions against general disclosure, by contract or court order first obtained. Another is that allowing the agency to rule first furnishes an inadequate procedure, because the standards for review are extremely limited, and an owner of proprietary information runs the risk of loss of his property on procedural and technical grounds. It is the courts, not the administrative agencies in the Executive branch which are charged with seeing that the Constitution is honored; it is the courts, not the administrative agencies, that decide whether a "taking", even when authorized by statute, is in fact taken for a public use. See, *Shoemaker v. U.S.*, 147 U.S. 298 (1893).

No doubt the courts at one time were reluctant to accept the notion of a declaratory judgment as constituting a judicial act. This reluctance was one of semantics, as Professor Bouchard observed long ago, because courts of law and equity have both engaged in making declarations of rights, duties, status and legal relations for centuries. The action in trespass with a feigned issue is nothing more than a declaratory

judgment to try title. Resolutions of conflicting claims between heirs and devisees, long known, are nothing more than declaratory judgments construing wills and statutes. Deliberate violations of municipal ordinances or statutes to invite charges defended by a challenge to the validity of the ordinance or the statute, are inherently proceedings whose object it is to obtain a declaration on the question of validity. A simple scanning of the table of contents in Bouchard's classic text will display countless other examples.

The only difference between those well established actions and the declaratory judgment action lies in the mere form of the action, and in the fact that in most cases a declaration is all the remedy that is needed. Once adjudicated, the dispute is resolved and the parties traditionally honor the adjudication. Further remedies, as by way of execution or enforcement of the adjudication, or by injunction "at the foot of the decree", is rarely needed, but can be provided in the same cause if necessary.

A modern recognition of the declaratory judgment action, perhaps the most civilized form of litigation of disputes yet devised, is found in *Super Tire etc., v. McCorkle*, 416 U.S. 1 (1974), from this circuit, in which the Supreme Court sustained jurisdiction even against a claim of mootness, on the ground that the controversy was real, genuine and continuing, and the case was one capable of repetition, yet evading review.

The declaratory judgment is an especially valuable tool in a case like this one. Not only will the determination (whatever it may be) resolve the existing controversy between the parties, but to the extent that its outcome is sound it provides precedent to be considered in the resolution of countless other controversies involving essentially the same underlying question all over the country. Even though this case be massive and difficult, its correct determination promises far more in judicial economy than the many emergency cases that would need to be filed with requests for temporary restraining orders after receiving a 10-day notice of intent to disclose proprietary information, which defendants propose.

The controversy is real and genuine. It involves a peculiar form of property that can vanish by evanescence, sublimation or osmosis. It is in that class of personalty, like the heirloom, the original manuscript of "Look Homeward, Angel", the Mona Lisa, the Venus de Milo, and other like items for which equity historically has provided the suitable remedy of specific reparation. By resolving the controversy now, through the declaratory judgment, the need for the extraordinary remedy of specific reparation can be avoided, as can the incalculable risk that even that remedy would be hollow if the *res* had meanwhile "gone public".

The court does not see this case as one of "judicial review" of some administrative action. Nor is this a case of conducting a hearing "de novo" after some administrative hearing and determination. Rather, this is a case invoking the original jurisdiction of the court, as a court of first impression. It is a plenary action to resolve a clear-cut controversy. Plaintiffs assert their claims of rights, duties and legal relations, and defendants contest them. There is nothing in the law to suggest that a governmental official, or a government agency, cannot be a party to a controversy within the scope of a declaratory judgment action. The books in jurisdictions throughout the nation, state and federal, have many precedents of this nature in which the controversy is between private parties on the one hand and government on the other.

On the record before this court, it has been clearly established that the disputed documents contain proprietary information, that defendants have no right to make any of it public or to provide it to a requester under the Freedom of Information Act or any other act, and that plaintiffs are entitled to a declaratory judgment to resolve the controversy. The court so finds on both the facts and the law.

Ordinarily, this is as far as a court would need to go. Ordinarily, a court would refrain from granting other or further relief beyond the declaratory judgment. This is especially so in a case involving officials and agencies of government because

the court expects that the declaration will be honored and adhered to so long as it remains in force.

With due regard for recognition of the principles of comity between the several branches, and with considerable reluctance, the court concludes and finds that its judgment in this case must provide a suitable remedy beyond the declaration itself.

The reason for this conclusion and finding is that in the course of the case, the defendants chose with awareness and deliberation to decline to submit some 152 documents sought for discovery, for *in camera* inspection so that the court could rule on various claims of privilege raised by them. The court's orders in this regard were drafted with great care, to assure defendants the same protection as is claimed by plaintiffs for their privileged information.

The mechanism chosen called for delivery of all the documents to the U.S. Attorney, who is the attorney of record for defendants under the General Rules of this District. A list of the documents was to be furnished to the court under seal, along with a designation of a few items in each claim of privilege to be inspected *in camera* under seal. Defendants were assured that no ruling adverse to any claim of privilege on any document would be made without first conducting an evidentiary hearing from which plaintiffs and their counsel would be excluded.

To the extent that defendants asserted that some documents contained proprietary information owned by persons not party to the action, the order directed that those persons be given notice so that they might appear and be heard on the question.

The court's orders in this regard were not honored. It is satisfied that this disregard of orders was not out of disrespect for the court, but rather to preserve some unknown and unidentified legal issue never presented. The cases are essentially uniform and clear that all the privileges claimed by

defendants, like the privilege claimed by plaintiffs are qualified privileges for which *in camera* inspection, hearings under seal, necessary deletions of sensitive matter, and the like, are part of the regular business of the trial courts.

The posture taken on these orders is both distressing and dismaying, because the clear inference is that a declaratory judgment, without more, will similarly be disregarded.

The process of balancing interests when dealing with privileged information subject to qualifications is quite simple. Given a colorable showing that the information is proprietary, recognition of the property right takes the form of ready (and not stingy) award of suitable protection against improper disclosure. The greater the degree of protection, the more generous a court can be in ordering disclosure. But when the indications are as strong as they are here that orders of the court will not be honored, there can be no confidence that its declaratory judgment, by itself will be honored.

What form that kind of additional relief ought to take is reserved until such time as the court has heard both sides on the issue. In the meantime, the protective order originally entered herein and as later particularized and refined, will remain in full force and effect. This will assure that the subject of the controversy will remain in the jurisdiction of this court pending resolution of the question now posed. This is seen as unavoidably necessary, for the time being, even though under other circumstances the court's inclination would be to supplement the declaratory judgment with a protective order to preserve the subject matter, and otherwise allowing delivery of the documents to defendants in Washington on suitable terms. The recalcitrance of defendants precludes that usual approach in this case and at this time.

The heart of the controversy having been disposed of above, it remains to treat a number of collateral issues.

The source of the claim is said to arise under Amendments 4 and 5 of the U.S. Constitution, under the FTCA, 15 USC §41

et seq., under the Administrative Procedure Act, 5 USC §551, et seq., 18 USC §1905, The Declaratory Judgments Act, 28 USC §2201, 2202; the Census Act, 13 USC §9, and the Federal Reports Act, 44 USC §3501, et seq.

In view of the analysis of the controversy, it is clear that the claim arises under federal law, the primary sources being Amendment 5 of the U.S. Constitution, the FTCA, and the Declaratory Judgment Act. The other references, to the extent pertinent, are corroborative of these major sources whether they provide independent grounds or not.

Jurisdiction is claimed under 28 USC §1331, 1337, 1361, and 2201 and 2202. The last two sections authorize the declaratory judgment remedy but are not jurisdictional grants in themselves. Jurisdiction is also claimed under 5 USC §701-706, but in view of the footing based on the Constitution, in the light of the *Lee, Lynah, Jacobs and Bivens* cases, and because of the restricted nature of the Administrative Procedure Act in comparison with the full, plenary nature of the action on constitutional aspects, these sources add nothing to the jurisdictional question.

Venue was also challenged. The court sees no arguable issue in this regard. The non-public investigation was aimed at I-R which is here in New Jersey. As the parent company owning all the stock of its wholly owned subsidiary, Torrington, I-R is the "real party in interest." Since venue is clearly proper as to I-R, there is no reason why proper parties like Mr. Wearly (to whom the subpoena was addressed) and Torrington (which manufactures the NRB's and LNR's) cannot join as plaintiffs in the same action. Had I-R brought suit alone, both could have applied to intervene because of their related interests, which are inextricably intertwined.

While this is probably not a "local" rather than "transitory" action, the fact is that property rights and property interests, in the context of a "taking" by government, are traditionally defined by state law rather than federal law. See,

for example, the Annotation at 1 ALR Fed. 479. Local law in the District of Columbia could not possibly have any application.

Next is the question whether FTC's summary proceeding for a court order to enforce the subpoena was a "mandatory counterclaim" under F.R.Civ.P. 13(a). The court is satisfied that it was. The language and the sense of the rule are clear: it requires, in mandatory form, that a pleading "*shall* state as a counterclaim *any claim which at the time of serving* the pleader had ***" (Emphasis added). The term "claim" is extremely broad and more than adequate to embrace FTC's claim for a subpoena enforcement order.

FTC protests, however, that under section 9 of the FTCA, such proceedings can only be brought in the district where the agency inquiry is being carried on, namely in Washington, D.C., and it so persuaded the learned District Judge there on the application of Mr. Wearly and I-R to transfer venue of the subpoena enforcement proceedings to this district (see Transcript of Hearing, Exh. D-1-C, vol III, pp. 820-821). With due regard to the view of that trial court, the question there presented was different. The question there was one involving a transfer of venue. The question here, where the plenary action was already pending, involves the applicability of the mandatory counterclaim rule. Only this court could effectively rule on the point, since a mandatory counterclaim could only have been filed here, not in the District of Columbia. The court is satisfied, and finds, that the summary enforcement claim is a claim coming within F.R.Civ.P. 13(a), and that it should have been stated as a counterclaim along with the answer in this case.

The mandatory counterclaim requirement is the closest that federal courts have come to the achievement of the laudable "single controversy" doctrine, under which all parties to a pending action in one court must assert in the same proceeding any and all related and connected claims.

Nor is the "venue" argument persuasive, in terms of where the "inquiry" was being conducted. The principle is well-established that when the mandatory counterclaim rule applies, venue requirements that would otherwise control have no application. No other treatment could possibly achieve the worthy purposes of the mandatory counterclaim requirement.

There is neither time nor space here to detail the independent steps taken by FTC, well after this action was underway, to initiate summary subpoena enforcement proceedings in the District of Columbia, although the full record there has been carefully reviewed. Suffice it to say that their culmination in an enforcement order is not res judicata of the issues here. In such proceedings, the party haled into court cannot assert, as a matter of right, claims and issues like those asserted here, and insist on having a decision on the merits. Nothing decided in the District of Columbia reached or decided the issues involved here. At best, they were regarded as premature, presumably to be considered after the claim of privilege had been asserted before FTC in connection with a proceeding for contempt or a criminal prosecution. For the reasons discussed above, the questions cannot be premature because proprietary information should never be disclosed unless the privileged conditions or protective order are first established.

If anything is clear about the law of res judicata, it is that the court in which that claim is advanced is the only court authorized to decide the issue That court is this court. The record is clear that the summary proceedings in the District of Columbia, although culminating in an enforcement order earlier in time than this ruling, neither took up nor decided the issues decided here. Absent an earlier *decision*, the defense of res judicata has no application.

Finally, there is the matter of sanctions sought by plaintiffs against defendants for their outright refusal, although respectful, to comply with the discovery orders here. The court believes that this point should be reserved for further deliberation and further hearing after the parties have recovered from

the "heat of the battle". Without sanctions, the evidential record is extremely strong. The testimony of plaintiffs' witnesses fully supported their claims, and were in no way depreciated by cross-examination. The samples of the disputed documents which the court inspected *in camera* fully corroborated that testimony. Under this court's discovery order, granted at defendants' request, all of the documents were gathered in New Jersey, put under strict controls to assure integrity and reliability, and made available to defendants not only for the purposes of this case, but also so that they could proceed with the non-public investigation at the same time. Defendants chose deliberately not to inspect the mass of documents so made available. The court can only infer and conclude that they are well aware that even with such inspection and further testimony, they could not successfully controvert the showing made that these sensitive documents contain proprietary information entitled to an effective protective order.

The record also contains examples of a number of instances where informal arrangements for confidential treatment of proprietary information were not strictly honored. One in particular, where proprietary information was made public without notice to the provider, and despite a supposed protective order by an administrative judge, is enough proof of the reality of the threat and risk in and of itself. Defendants argued that the disclosure did not violate the literal terms of the order, but it strains credulity to argue that this position is other than hypertechnical and that both the FTC staff and the administrative judge must have been fully aware that the disclosure was an evasion, and a violation of the spirit of the order. This kind of behavior by government simply cannot be countenanced.

So far as the 152 documents are concerned, the fact that claims of privilege were raised allows no adverse inferences to be drawn. However, the unexplained refusal of defendants to submit these documents for *in camera* inspection and for hearings under seal without the presence of any representative of plaintiffs does warrant the inference that, if the privilege

claims were found to be unwarranted or subject to a balancing test, the facts disclosed thereby would have been adverse to defendants.

As noted above, the decision here is reached without the benefit of these inferences. The utter inadequacy of a suitable system of full protection against disclosure, established *before* any proprietary information is turned over, is sufficient to support the judgment.

Also, although some courts have regarded criminal statutes such as 18 USC §1905 as providing adequate protection, this court cannot agree. This kind of statute is at best precatory and unenforceable as of right by the aggrieved person. The most the owner of proprietary information can do, if his property is destroyed by improper disclosure by a government employee, is to file a complaint charging violation of the criminal statute. Given the vast number of government employees, and the plethora of copy machines, the complaint would doubtless have to be against "John Doe". From that point on the vindication of his claim through the criminal justice system would be dependent entirely on the efficacy of the investigative process and prosecutorial discretion whether or not to press the charge. And a "reasonable doubt," by itself, would be enough to bar conviction. Even if the culprit were found, charged, tried, convicted and sentenced, this would be no remedy at all for the loss of property through improper disclosure. The damage would have been done, and would be irreparable. Nothing short of enforceable means established in advance of compulsory disclosure will serve.

After review of this ruling, the parties are directed to appear before the court on November 3, 1978, at 10 AM, so that they may present their views in regard to the tenor and phrasing of a final judgment in accordance herewith.

October 18, 1978

s/Vincent P. Biunno, U.S.D.J.

Original to Clerk
xc: All parties